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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

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STEPHEN STEWART,
Petitioner,

vs.

PAUL J. KEOHANE,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI

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December 2, 1994

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QUESTIONS PRESENTED

In a community rife with corruption, a judge facing a retention election rendered a controversial verdict in a highly publicized criminal case. Soon after the verdict, one frequent courtroom spectator asked another, "What do you think, was [the judge] paid off in drugs or money?" and "Do you think [the judge] took cash or cocaine for that verdict?" No one else heard the questions, and the sole listener only repeated them to the judge. Later, the listener testified he "hadn't the slightest clue" what these questions meant; he further testified that the questions did not alter his high opinion of the judge.

The questions presented are:

1. Whether, under the circumstances of this case, the speech was protected under the First Amendment.

2. Whether the First Amendment allows a judge to recover emotional distress damages in a defamation action in the absence of harm to his reputation.

LIST OF PARTIES

The parties to the proceedings before the Colorado Supreme Court and the Colorado Court of Appeals were Stephen Stewart (the Petitioner), Paul J. Keohane (the Respondent), and Grover Wilkerson and Terri Campbell. Mr. Wilkerson and Ms. Campbell were defendants with Mr. Stewart at the trial court level, and appealed the jury verdicts entered against them. The Colorado Court of Appeals reversed the verdicts against Mr. Wilkerson and Ms. Campbell, and the Colorado Supreme Court affirmed the reversal. Petitioner believes that Mr. Wilkerson and Ms. Campbell no longer have an interest in the outcome of the case, and for that reason, they are not named as parties in the Petition for Certiorari.

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◆

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the Colorado Supreme Court in this case.

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OPINIONS BELOW

The opinion of the Colorado Supreme Court, which has not yet been released for official publication, is reported at Keohane v. Stewart, 1994 W.L. 328562 (Colo. July 11, 1994) and is included in the appendix at App. 1a-34a. The Colorado Supreme Court's Order denying rehearing is included in the appendix at App. 35a-36a. The opinion of the Colorado Court of Appeals is reported at Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), and is included in the appendix at App.37a-54a. The Order for Entry of Judgment of the District Court is included in the appendix at App. 55a-58a.

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JURISDICTION

The Opinion and Judgment of the Colorado Supreme Court was entered on July 11, 1994. A timely Petition for Rehearing, which is included in the Appendix at App. 59a-68a, was denied on September 6, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

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CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 1 to the United States Constitution states in part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Amendment 14, Section 1 to the United States Constitution states in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law."

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STATEMENT OF THE CASE

This case presents fundamental issues concerning (1) the rights of citizens to raise questions about the conduct of public officials, and (2) whether a public official must prove harm to his reputation in order to recover damages for defamation. This appeal arises from the Colorado Supreme Court's affirmance of a jury verdict against Stephen Stewart in a defamation action brought by former Fremont County District Judge Paul Keohane. At the time Stewart made the remarks at issue in this case, Keohane was facing a retention election after having just presided in a high profile criminal case in which the defendant, a doctor, was accused of sexually assaulting an anesthetized teenage girl. Keohane found the doctor not guilty by reason of impaired mental capacity.

After losing the retention election, Keohane sued Stewart for allegedly asking a newspaper reporter, following the sexual assault decision, if he thought Keohane was "paid off with drugs or money." These remarks were heard only by the reporter and caused no harm to Keohane's reputation; in fact, the reporter, who repeated them only to Keohane, continued to hold Keohane in high regard. The jury nonetheless awarded Keohane $15,000 in compensatory damages and $5,000 in punitive damages. On post-trial motion, punitive damages were reduced to $2,500. Both the Colorado Court of Appeals and the Colorado Supreme Court affirmed the award against Stewart.

A. Factual Background.

From 1980 until 1988, Keohane was a district court judge in Cañon City, Colorado. During this period, Cañon City, along with the rest of Fremont County, was fraught with corruption and misconduct in the legal and medical professions. For example, Cañon City's district attorney was arrested for drug dealing, and an assistant district attorney left town while being investigated on the same charges.

It was also reported on the Oprah Winfrey Show that a Cañon City doctor had persuaded another doctor to sew up his wife's vagina. Shortly after this doctor's activities were revealed, yet another Cañon City doctor, Dr. Gallagher, an anesthesiologist, was charged with sexually assaulting an anesthetized sixteen-year-old girl. According to articles published in the main town newspaper, the Cañon City Daily Record, Dr. Gallagher destroyed his scrub suit before the crime was reported to the police. Physical evidence obtained from the victim indicated "the chances were one in 4.7 billion" that someone other than Dr. Gallagher committed the assault. Furthermore, Dr. Gallagher confided in a fellow doctor and asked him not to reveal the crime.

Once his criminal case was assigned to Keohane, Dr. Gallagher opted for a trial to the court. Keohane failed to recuse himself, even though before becoming a judge he had represented the hospital where Dr. Gallagher worked. When the possibility arose that Keohane might not be the presiding judge due to an injury requiring surgery, Dr. Gallagher asked for a continuance. Keohane managed to preside at the trial as scheduled, however, by stopping his pain medication within days after his surgery. The Daily Record and other regional newspapers published these factual and procedural details concerning the Gallagher trial.

Many Cañon City citizens attended the Gallagher trial. Stewart, who was then a councilman-at-large for Cañon City, was an occasional spectator. At one point in the trial, Keohane chastised the victim's grandfather, and then Stewart, for allegedly disrupting a witness's testimony. In fact, Keohane threatened to order Stewart out of the courtroom. At one point, when Stewart was leaving the courtroom, Dwight Jurgens, a reporter for the Daily Record, reportedly heard Stewart comment: "That's the best judge money can buy." While the trial was still in progress, Jurgens published an article about this exchange, including Stewart's parting comment.

At the end of the trial, Keohane found Dr. Gallagher not guilty by reason of impaired mental condition. Dr. Gallagher received no prison sentence; instead, he was ordered to report to a state mental institution. Many Cañon City citizens were outraged. The local papers were filled with articles and letters to the editor concerning Keohane's verdict in the Gallagher case and his overall judicial performance. A few days after Keohane rendered his unpopular verdict, Fremont County citizens voted not to retain him in office by a margin of almost 3,000 votes.

After being voted out of office, Keohane sued fifteen individuals for defamation. Most of his claims alleged that he had lost the election as a result of various letters to the editor which harshly criticized his judicial performance.[1] However, the allegedly defamatory speech involved in Keohane's claim against Stewart concerned oral, rather than written remarks. Furthermore, the basis for Keohane's defamation claim against Stewart was not the remark, "that's the best judge money can buy." Instead, the remarks at issue in this case were reportedly made immediately *after* the Gallagher decision and before the retention election. Specifically, Jurgens testified that, after the decision, Stewart saw Jurgens at the offices of the *Daily Record* and asked the following questions:

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[1] By the time of trial, claims against only seven defendants remained. The case against one defendant was severed early in the trial, and claims against three of the other defendants were dismissed at the end of Keohane's case-in-chief. Only Keohane's claims against Stewart, Terri Campbell, and Grover Wilkerson went to the jury. The jury awarded Keohane damages against all three defendants; however, the Colorado Court of Appeals reversed the judgments against Campbell and Wilkerson because the speech involved in the claims against those defendants was protected under the First Amendment. The Colorado Supreme Court affirmed.

> Stewart: What do you think, was he paid off with drugs or money?
>
> Jurgens: What?
>
> Stewart: Do you think he was paid off in cash or cocaine?
>
> Jurgens: Steve, you are a real piece of work.

Record on Appeal, Vol. III at 586.

Jurgens did not write a story for the *Daily Record* about this conversation, but he did mention it to Keohane. At the defamation trial, Jurgens stated that he "hadn't the slightest clue what the intended meaning" of Stewart's questions was. Record on Appeal, Vol. III at 612. His "immediate instinct" was that Stewart was "kidding" and speaking sarcastically. *Id*. at 610-611. He also testified that he had told no one but Keohane of his conversation with Stewart. *Id*. at 612-614.

Keohane introduced no evidence of reputational damages caused by Stewart's remarks. In fact, Jurgens testified that Stewart's remarks did not affect the respect he had for Keohane. *Id*. at 613. Keohane testified only that he felt "devastated" after reading the Jurgens article concerning Stewart's courthouse comment ("that's the best judge money can buy"), and that he felt "worse" after Jurgens told him of the later Stewart conversation. Record on Appeal, Vol. II at 210-211. There was no testimony that Keohane suffered any physical manifestations from being upset about Stewart's questions.

B. Proceedings Below.

1. Trial Court.

The trial court instructed the jury that Stewart's questions were slanderous per se. Despite Jurgens' testimony, the trial court interpreted the questions to constitute an unambiguous factual assertion that Keohane had taken a bribe for the verdict in the Gallagher case. I light of the court's conclusion, the only issues the jury decided were: (1) whether Stewart actually had asked the questions (he denied having done so); (2) if so, whether Stewart had asked the questions with actua malice; and (3) the amount of damages to be awarded. The jury found for Keohane and awarded him $15,000 in compensatory damages and $5,000 in punitive damages. At the post-trial motions hearing, the tria court reduced the punitive damage award to $2,500.

2. Colorado Court of Appeals.

The Colorado Court of Appeals affirmed the award against Stewart. After analyzing the questions in light of Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), it upheld the trial court's finding that they were not constitutionally protected. App. at 43a-44a. With respe to the damages award, the Court of Appeals determined that Keohane' testimony was sufficient proof of damages to support the $17,500 verdict against Stewart. App. at 53a.

3. Colorado Supreme Court.

In a 4-3 decision, the Colorado Supreme Court also affirmed th award against Stewart. Citing Milkovich, the majority held that the questions were not protected by the First Amendment. First, the cour determined that the questions were "provable as false" because "[t]he implication underlying the questions is clear: Stewart was asserting th Judge Keohane took a bribe." App. at 15a. Second, the majority determined that "a reasonable person would have concluded that Stew was asserting an actual fact." App. at 16a. In determining the secon issue, the court examined factors drawn from its opinion in Burns v. McGraw Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983), which include "the phrasing of the statement, the context in which it appears and the circumstances of its publication" (the "Burns factors"). App. 8a, 16a-17a.

Based on its application of the Burns factors to Stewart's questions, the majority concluded that: (1) the phrasing of the questions conveyed that Keohane actually took a bribe and Stewart was only inquiring as to what the bribe consisted of; (2) Stewart's position as a city councilman suggested that he was basing his assertion on facts known to him by virtue of his political office; (3) the history of official misconduct in Cañon City would lead reasonable people to believe Stewart was alleging Keohane was also guilty of criminal activity; (4) Stewart's previous remark, "That's the best judge money can buy," would alert the listener to the implication of bribery in the questions; and (5) because the questions implied criminal action, they were not constitutionally protected. App. at 16a-17a.

The dissent strongly disagreed with the majority's application of the Burns factors. It argued that Stewart's questions could not reasonably be understood as factual assertions because: (1) they were "a hyperbolic and figurative expression of" Stewart's dissatisfaction with the verdict in the Gallagher trial; (2) the questions were made as Keohane was facing a retention election, a time when rhetorical hyperbole frequently punctuates conversations about political officials; (3) the questions did not imply that Stewart was privy to additional information by virtue of his position as a city councilman; and (4) because the questions were oral and made to only one person, the fact that Jurgens did not understand them to convey a defamatory meaning was relevant in determining that the questions could not reasonably be understood as factual assertions. App. at 24a-28a.

With respect to the damages award, the majority relied on Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976), to support its holding that the "actual damages" which a public official must prove in order to recover in a defamation action may be established by evidence of emotional harm alone; it is not necessary for a public official in Colorado to prove the defamatory speech harmed his reputation. App. at 18a-20a. The dissent disagreed, arguing that harm to reputation should be a prerequisite to recovery in a defamation action, especially in cases involving public officials or speech of public concern. App. at 33a.

Stewart's timely Petition for Rehearing was denied on September 7, 1994.

REASONS FOR GRANTING THE PETITION

"At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988). Harsh, even vituperative, speech about public officials is integral to our democratic society. The result in this case is completely at odds with the First Amendment: a judge, upset at some intemperate remarks about a controversial verdict, was allowed to recover damages for his hurt feelings despite affirmative evidence that the remarks conveyed no defamatory meaning and caused no harm to his reputation. This Court should review the Colorado Supreme Court's decision in order to correct a blatant misapplication of the First Amendment and to hold that a citizen cannot be punished for speech about a public official's performance of his public duties merely because the official's feelings were hurt.

I. THE COLORADO SUPREME COURT'S FAILURE TO CONSIDER THE ONLY LISTENER'S INTERPRETATION OF THE QUESTIONS VIOLATED THE FIRST AMENDMENT AND WILL HAVE A CHILLING EFFECT ON SPEECH.

In determining whether Stewart's questions constituted protected speech, the Colorado Supreme Court, citing Milkovich, asked whether a "reasonable person would have concluded that Stewart was asserting an actual fact." App. at 16a (emphasis added). Because only one person heard the questions and testified as to his interpretation of them, the Colorado Supreme Court should first have asked whether the actual listener (not some hypothetical reasonable person) concluded Stewart was asserting an actual defamatory fact. Instead, the Colorado Supreme Court refused to consider Jurgen's interpretation. As a result, Stewart's questions were deemed to be actionable, even though the only person who heard them did not understand them to have a defamatory meaning. This perverse outcome should be reviewed for several reasons.

First, the Colorado Supreme Court's disregard of the actual listener's interpretation highlights the existence of conflict and confusion in how to apply the "reasonable person" test. Such confusion leads to uncertainty about what speech is protected, and this uncertainty inevitably results in an undesirable chilling effect. Second, allowing a judge or jury to disregard the actual recipient's interpretation will chill speech because the speaker can no longer rely on his knowledge of how his audience will interpret his remarks. Third, the court's disregard of the portions of the record addressing Jurgens' interpretation of Stewart's questions violated this Court's repeated mandate that de novo review of defamation claims is necessary to preserve First Amendment freedoms. By failing to review the record de novo, the Colorado Supreme Court failed to provide the protection envisioned by Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

A. Conflict and Confusion Exist with Respect to How to Apply the Reasonable Person Test.

This case reflects confusion about how Milkovich's "reasonable person" test is to be applied. In the case below, the Colorado Supreme Court disregarded Jurgens' interpretation in finding that Stewart's questions were not protected. App. at 16a n.14. In contrast, a California Court of Appeal disregarded the interpretations of persons actually exposed to speech in order to reach the opposite conclusion, i.e., that the speech was protected. San Francisco Bay Guardian, Inc. v. San Francisco Superior Court, 17 Cal. App. 4th 655, 21 Cal. Rptr. 2d 464 (1993).

This confusion appears to stem from the fact that courts and commentators have disagreed on the extent to which Milkovich allows contextual factors to be considered in the "reasonable person" analysis. For example, some courts and commentators have concluded that Milkovich did not substantively affect prior case law, but merely changed the terminology of the fact/opinion analysis.[2] Other courts and commentators have concluded that, by implication, Milkovich still allows courts to examine context in evaluating the actionability of a statement, but incrementally lowers the degree of constitutional protection.[3] Still other courts and commentators expressly or impliedly believe Milkovich dictates that context, for the most part, should not be considered in evaluating whether a statement is constitutionally protected.[4] Finally, some state supreme courts have demonstrated their

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[2] See, e.g., Rodney A. Smolla, The Law of Defamation § 6.01(2) at 6-4.1 to 6-5 (1991) (rather than eliminating existing protection of opinion, Milkovich rearticulated the language describing protected speech and "reversed the order of analysis," asking first "whether the speech was 'factual'" rather than whether the speech was "opinion"); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727 (1st Cir.), cert. denied, 112 S.Ct. 2942 (1992) ("while eschewing the fact/opinion terminology, Milkovich did not depart from the multi-factored analyses" used by lower courts attempting to distinguish fact

(continued...)

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[2](...continued)
from opinion); Wheeler v. Nebraska State Bar Ass'n, 244 Neb. 786, 508 N.W.2d 917, 921-922 (1993), cert. denied, 114 S.Ct. 1835 (1994) (holding Milkovich to be consistent with pre-Milkovich cases applying a "totality of the circumstances" analysis).

[3] See, e.g., Robert D. Sack & Sandra S. Baron, Libel, Slander, and Related Problems, 213-215 (2nd Ed. 1994) (although some cases will be decided differently under Milkovich, most will be decided to reach the same results which would have been reached before Milkovich); Yetman v. English, 168 Ariz. 71, 811 P.2d 323, 330-33 (1991) (although the Arizona Supreme Court found context was relevant to determine the actionability of the question, "What kind of communist do we have up there that thinks it's improper to protect your interests?", the court also held that Milkovich discouraged courts from finding a statement protected if it is capable of bearing a defamatory meaning).

[4] See, e.g., Martin F. Hansen, Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech, 62 Geo. Wash. L. Rev. 43, 56-57 (1993) (based on the analysis and result of Milkovich, it appears that "once a court concludes a statement was meant 'seriously' rather than rhetorically," the court can analyze the statement's actionability without regard to context); Unelko Corp. v. Rooney, 912 F.2d 1049, 1053-1054 (9th Cir. 1990), cert. denied, 499 U.S. 961 (1991) (after noting Milkovich "effectively overruled" 9th Circuit law on the fact/opinion distinction, the court's actionability analysis ignored circumstances surrounding publication except to examine the statement's tone and whether it contained hyperbole).

confusion about the Milkovich holding by applying the case to reach seemingly irreconcilable verdicts.[5]

The Colorado Supreme Court demonstrated its confusion over the implications and application of Milkovich by applying the same contextual factors inconsistently in the case below. The court pointed to conjectural phrasing and the political backdrop in Cañon City to find letters to the editor written by another defendant to be protected speech; yet the Court disregarded the speculative phrasing of the questions and cited the political backdrop in Cañon City to reach the conclusion that Stewart's questions were not protected. App. at 9a-14a, 16a-17a.

In any event, the Colorado court's decision simply cannot be reconciled with the Court's prior decisions protecting hyperbole, see Milkovich, 497 U.S. at 16-17 (citing Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler, 398 U.S. 6 (1970); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974)), nor the decisions of other courts faced with similar speech. See, e.g., Carr v. Warden, 159 Cal. App. 3d 1166, 206 Cal. Rptr. 162 (1984) (the California court held that the question, "I think someone is being bought on the Planning Commission, otherwise, how could you explain a 3-3 vote at one meeting on an issue and then at the very next meeting, a 6-1 vote?", is protected under the First Amendment); Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993) (the Fourth Circuit held the inquiry,

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[5] Compare Spence v. Flynt, 816 P.2d 771 (Wyo. 1991), cert. denied, 112 S.Ct. 1668 (1992) (the Wyoming Supreme Court found the speech to be unprotected by completely ignoring important contextual factors) with Dworkin v. L.F.P., Inc., 839 P.2d 903 (Wyo. 1992) (the Wyoming Supreme Court found the speech to be protected by considering contextual factors, including the medium of dissemination and the type of language used); also compare Yetman v. English, 168 Ariz. 71, 811 P.2d 323 (1991) (the Arizona Supreme Court held that a question posed by a republican about a democrat at a Republican Club luncheon could reasonably be understood as an assertion of fact) with Turner v. Devlin, 174 Ariz. 201, 848 P.2d 286 (1993) (the Arizona Supreme Court held that a statement contained in a letter written by a school nurse to complain about a police officer's conduct could not reasonably be understood as an assertion of fact).

"Who will benefit more from the project -- GI's or veteran charity entrepreneur Roger Chapin . . . ," is not actionable under the First Amendment).

B. Deferring to the Judge or Jury, Rather than the Actual Listener, in Determining Whether Speech Can "Reasonably" Be Interpreted As Defamatory Will Inhibit Conversations between Individuals About Public Officials.

To fully protect speech, the interpretation of the actual listener must be considered. Otherwise, the issue of whether the speech contains a defamatory meaning is left entirely to the judge or a jury. If the actual recipient's interpretation is ignored, it would allow judges to "manufacture" "an implied defamatory meaning" from non-defamatory speech. White v. Fraternal Order of Police, 909 F.2d 512, 519 (D.C. Cir. 1990). Worse, submitting the issue to the jury invites the danger that juries will use the law of defamation to punish, and thereby suppress, unpopular speech. Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971).[6]

As the law in Colorado now stands, instead of being able to rely on his knowledge of how his audience will react, a speaker wishing to avoid liability for defamation will need to consider how strangers, particularly judges, will interpret what he says. In fact, the speaker will need to consider whether his comment is subject to more than one interpretation; if any one interpretation could reasonably be construed as defamatory, he will be subject to liability.[7] Moreover, the speaker is subject to liability even if only a substantial minority of the community could find a particular interpretation of the statement to be defamatory. See App. at 16a n.14.

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[6] It should be noted that, upon Keohane's request, venue was transferred from Cañon City to Colorado Springs. Thus, a judge and jury removed from the political turmoil in Fremont County evaluated the appropriateness of Stewart's speech in deciding this case.

[7] Stewart's questions were facially ambiguous. For example, they could mean "Did Keohane take a bribe; if so, what was the bribe (cash or drugs)?" They could also mean, "Do you, Jurgens, think Keohane took a bribe?" The most plausible interpretation is not the one given to the questions by the courts below (i.e., Keohane took a bribe of some sort), but rather that Stewart was expressing his dismay at the verdict by positing a possible explanation so often made when speaking about the inexplicable actions of public officials: was there a payoff?

This oppressive result should not be allowed to stand. If the actual recipient does not understand the speech to be defamatory, the court's inquiry should end there. If, on the other hand, the actual recipient does understand the speech to be defamatory, a court should then apply the reasonable person test to determine whether the defamatory speech still warrants First Amendment protection.

C. The Colorado Supreme Court Failed to Use De Novo Review When Implementing the Reasonable Person Test.

In Bose, this Court stated that independent review is absolutely necessary in First Amendment cases. It held that appellate courts have the duty to "'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" 466 U.S. at 499 (quoting New York Times v. Sullivan, 376 U.S. 254, 284-286 (1964). The Court reiterated the importance of this protection in Milkovich. 497 U.S. at 17. Instead of examining the evidence in the record concerning Jurgens' understanding of the questions, the Colorado Supreme Court actually deferred to the trial judge because "the reasonable understanding of [Stewart's] remarks turns in part on . . . inflection." App. at 18a n.15. This deference is baffling. It is not altogether clear whether the court is referring to Stewart's inflection when he spoke to Jurgens, or to Jurgens' inflection when he testified. Regardless, the trial court never made any finding on inflection; indeed, it found the statements were actionable at the summary judgment stage. See App. at 69a-73a. As a result, the decision chills speech because, in applying the reasonable person test, the Colorado Supreme Court did not serve its function of ensuring, through independent review, that the lower courts did not manufacture an implied defamatory meaning from non-defamatory speech.

As this Court recognized in Harte-Hanks Communications, Inc. v. Commaughton, 491 U.S. 657, 686 (1989), "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech . . . ." Certiorari should be granted to eliminate the chilling effect of this decision by resolving the role of context, especially the role of the actual recipient's understanding, in applying the constitutional "reasonable person" test.

II. THE COLORADO SUPREME COURT'S HOLDING THAT A PUBLIC OFFICIAL MAY OBTAIN DAMAGES FOR SPEECH ABOUT HIS PUBLIC CONDUCT, DESPITE A TOTAL LACK OF EVIDENCE THAT IT CAUSED HARM TO HIS REPUTATION, OFFENDS THE FIRST AMENDMENT AND ALSO OPERATES TO CHILL SPEECH.

The Colorado Supreme Court held that public officials are not constitutionally required to prove harm to reputation to recover in a defamation action. As a result, a judge unhappy with being voted out of office was able to retaliate against at least one of his detractors. This portion of the court's decision is perhaps the most chilling aspect of the case. Moreover, it illustrates that the actual malice test is not alone sufficient to protect speech. This result would not have occurred but for the Colorado Supreme Court's misapplication of two United States Supreme Court cases.

A. Allowing Public Officials to Recover for Hurt Feelings Will Chill Speech.

This Court has consistently stressed that the First Amendment was intended to encourage debate about public issues, including "vehement," "caustic," and "unpleasantly sharp" comments about public officials. See, e.g., Falwell, 485 U.S. at 51; New York Times, 376 U.S. at 270. It is critical to our concept of a free society that the law not inhibit discussion of issues of public concern, including the performance of public officials. Under these circumstances, even false speech can serve a positive purpose if it generates debate about political issues. See, e.g., New York Times, 376 U.S. at 279 n.19. More importantly, such discussion allows citizens a peaceful outlet for venting their frustration and indignation about their government's performance. Instilling fear of liability for "sounding off" about current events will cause some citizens to refrain from voicing their opinions about matters of public concern and will eliminate a much needed "safety valve" for others.

> The maintenance of the opportunity for free political discussion to the end that government

> may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

New York Times, 376 U.S. at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

Allowing a public official to recover for hurt feelings is fundamentally at odds with this longstanding tradition of encouraging public discourse. In New York Times, this Court recognized that "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute," and that such "fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 277-78. The decision below will encourage public officials to sue to recover for hurt feelings. Correspondingly, by raising the fear of damage awards, it will also stifle discussion on matters of public concern. Certiorari should be granted because this chilling result is contrary to the very heart of the First Amendment.

B. Keohane's Damage Award Indicates that Actual Malice Protection Is Not Sufficient to Protect Intemperate or Hyperbolic Comments about Public Officials.

The actual malice standard alone will frequently be inadequate to protect conversations between individuals about political matters. In this context, hyperbole about a controversial decision by a public official may be the norm, rather than the exception; this Court has previously noted that "hints of bribery, embezzlement, and other criminal conduct are not infrequent" in such circumstances. New York Times, 376 U.S. at 273 n.14. For example, a speaker may use satire, sarcasm, irony, metaphor, or hyperbole for effect and to stimulate debate with his listener. Indeed, Jurgens testified that, based on his experiences with Stewart, one never knew when Stewart was saying something merely for effect. Additionally, speculative comments or conjecture are also common means of expressing opinions on political matters. Almost by definition, such statements may be made with reckless disregard for the truth because they purposely use exaggerated or metaphorical, rather than literal, speech to express a point of view.

In particular, intemperate comments about public officials are frequently made without reflection or deliberation. At the time made, they may be believed on a "gut-level" basis; however, when the speaker is "on trial" and has been sworn to tell the truth in an intimidating courtroom atmosphere while subject to cross-examination, it may be impossible for him to maintain that he seriously believed his earlier remarks.

Protecting conjectural statements about public officials is "intrinsic to 'the free flow of ideas and opinions on matters of public interest and concern' that is at 'the heart of the First Amendment.'" Milkovich, 497 U.S. at 34 (Brennan J., dissenting) (quoting Falwell, 485 U.S. at 50). According to the Colorado Supreme Court, citizens who use colorful, creative, or cutting language during private conversations to express their opinions on public officials risk being subjected to liability. Yet, if citizens do not feel free to express their views on public issues in private conversations, the inevitable result will be a populace that, fearful of liability, wills itself into silence and apathy about public affairs. Indeed, a major daily newspaper in Denver reacted with concern to the decision here for precisely that reason. App. at 74a-76-a.

C. The Colorado Supreme Court Erred in Applying Firestone to a Public Official.

The Colorado Supreme Court acknowledged that Stewart's questions caused no harm to Keohane's reputation. App. at 19a. However, citing Time, Inc. v. Firestone, 424 U.S. 448 (1976), the court stated that its decision to uphold the damages award did not affect significant constitutional interests. App. at 18a. This assertion is belied by a long history of First Amendment jurisprudence, which: (1) recognizes that damages awarded in defamation actions have a significant chilling effect on speech; and (2) correspondingly rejects the proposition that the law must be solicitous of the feelings of public officials, especially when that public official is a judge. See, e.g., New York Times, 376 U.S. at 268, 273, 277; Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-345, 349 (1974).

In support of its position that defamation damages do not threaten constitutional interests, the Colorado Supreme Court relied on Firestone's holding that the "States could base awards on elements other than injury to reputation . . . consistently with the Constitution . . . ." 424 U.S. at 460. What the Colorado Supreme Court failed to recognize was that in Firestone, the Court reached its holding only after deciding that the plaintiff was a private figure. App. at 18a-20a. The court also failed to recognize that, since Firestone, this Court has continued to disapprove of damage awards for emotional harm incurred by public figures as a result of speech about their public conduct. See Falwell, 485 U.S. at 52 (noting that, in its defamation decisions, the Court has permitted liability for speech about public officials only when both harm to reputation and actual malice have been proved). This Court should grant certiorari to explicitly limit Firestone to speech about private figures, and to prohibit public officials from recovering for mere hurt feelings.

◆

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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In cooperation with the American
Civil Liberties Union Foundation
of Colorado

December 2, 1994.

*Counsel of Record

No. 94- ________

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

◆

STEPHEN STEWART,

Petitioner,

vs.

PAUL J. KEOHANE,

Respondent.

◆

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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December 2, 1994

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SUPREME COURT, STATE OF COLORADO

NO. 93SC382 July 11, 1994

PAUL J. KEOHANE, Petitioner/Cross-Respondent,

v.

STEPHEN STEWART, Cross-Petitioner,

and

GROVER K. WILKERSON AND TERRI CAMPBELL, Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

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Canon City, Colorado

Holland & Hart
A. Bruce Jones
Alan N. Stern
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Denver, Colorado

American Civil Liberties Union
David H. Miller
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JUSTICE ERICKSON delivered the Opinion of the Court.
CHIEF JUSTICE ROVIRA concurs in part and dissents in part, and JUSTICE LOHR and JUSTICE MULLARKEY join in the concurrence and dissent.

We granted certiorari to review Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), in which the court of appeals held that the plaintiff's defamation claim against a newspaper and the author of two articles was not actionable but that the defamation claim against Stephen Stewart, a city councilman, was actionable. The court of appeals also held that there was sufficient evidence in the record to support an award of damages against Stewart. We affirm the court of appeals.

Dr. Michael Gallagher was charged with sexually assaulting an anesthetized sixteen-year-old female patient at St. Thomas More Hospital on October 15, 1987. According to the allegations, anesthesiologist Dr. Gallagher masturbated and ejaculated into the patient's mouth during surgery. According to the Cañon City Daily Record and other regional newspapers, evidence suggested that Gallagher was guilty of sexual assault. For example, the papers reported: Gallagher destroyed his scrub suit before the crime was reported to the police; DNA testing revealed that the chances were one in 4.7 billion that someone other than Gallagher committed the assault; and Gallagher revealed his actions to another doctor and asked him not to disclose the crime.

After criminal charges were filed against Dr. Gallagher, the case was assigned to Judge Paul J. Keohane, a district court judge in the 11th Judicial District. Dr. Gallagher waived a jury and opted for trial to the court. Judge Keohane had represented St. Thomas More Hospital from 1965-1980, but did not recuse himself. He did, however, disqualify a deputy district attorney whose wife was a hospital employee. After the prospect arose that Judge Keohane might not be able to preside over the case due to an injury that required surgery, Dr. Gallagher requested a continuance. Judge Keohane was, however, able to preside over the case shortly after his surgery. The Cañon City Daily Record and other newspapers published these factual and procedural details regarding Judge Keohane's decisions to remain the judge presiding over Dr. Gallagher's trial.

After Dr. Gallagher's trial began, Dwight Jurgens, a reporter for the Cañon City Daily Record, heard Cañon City Councilman Stephen Stewart comment: "That's the best judge money can buy." Jurgens subsequently published an article about the Gallagher trial which included Stewart's remark.

On November 3, 1987, Judge Keohane found Dr. Gallagher not guilty by reason of impaired mental condition and ordered Dr. Gallagher to report to a state mental institution. Judge Keohane did not impose a prison sentence. There was widespread outrage among the citizens of Cañon City about the outcome of the Gallagher trial.

After the verdict in the Gallagher trial was announced, Stewart approached Jurgens and asked him: "What do you think, was [Judge Keohane] paid off in drugs or money?" and "Do you think he was paid off in cash or cocaine?" These remarks were not published in the newspaper.

On November 8, 1988, the day of Judge Keohane's retention election, two letters written by Terri Campbell, a retiree and resident of Cañon City, appeared under assumed names in the Fremont Observer, a local weekly newspaper. The letters did not refer to Judge Keohane by name, but did refer to collusion and pay-offs between judges and doctors.[1] A few days after the trial was completed, Judge Keohane appeared on the ballot and before the electorate for retention. The citizens of the 11th Judicial District voted not to retain Judge Keohane in office.

After the loss of his retention election, Keohane filed a defamation action against thirteen defendants including Stewart,[2] Campbell, and Grover Wilkerson, the editor of the Fremont Observer. At the conclusion of the trial, only the claims against Stewart, Campbell, and Wilkerson were submitted to the jury. The trial court instructed the jury that Stewart's statements constituted slander per se.

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[1] Both letters relate to the same episode.

[2] Keohane's claim against Stewart for slander was based solely on the remarks made by Stewart to Jurgens after the verdict was announced and not on the published remark that Keohane was the "best judge money can buy."

With respect to Campbell's letters, the court instructed the jury as to libel per quod.[3] The jury returned verdicts in favor of Judge Keohane, awarding him $15,000 in compensatory damages and $5,000 in punitive damages against Stewart, $25,000 in compensatory damages and; $1,000 in punitive damages against Campbell; and $25,000 in compensatory damages and $2,500 in punitive damages against Wilkerson. The punitive damages award against Stewart was subsequently reduced to $2,500 by the trial court.

On appeal, the court of appeals concluded that the letters written by Campbell and published by Wilkerson were constitutionally protected and thus not actionable in a defamation action. It also concluded that Stewart's remarks were not constitutionally protected because "a reasonable person could conclude that Stewart was implicitly asserting as actual fact that Judge Keohane had accepted a bribe based upon undisclosed facts known to him as a city councilman." Keohane, 859 P.2d at 291.[4] The court of appeals also held that the evidence was sufficient to permit the jury to conclude that Judge Keohane suffered actual damages as a result of Stewart's comments to Jurgens.

II

The respondents assert that their respective statements are not actionable because they are constitutionally protected under the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution. Therefore, we first consider the standards for determining the actionability of a defamation claim.

In Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983), this court set forth the standard for determining the actionability of a defamation claim. The Burns standard was subsequently fortified by Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), which eliminated the arbitrary distinction between statements of fact and statements of opinion. The respondents assert that because their communications are statements of opinion, they are constitutionally protected speech. We are not persuaded.

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[3] A statement is libel per quod if it requires innuendo or extrinsic evidence to establish its defamatory nature. Burnstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

[4] The court of appeals also held that the trial court properly instructed the jury that Stewart's comments were slanderous per se. We denied certiorari on this issue and thus it is not before us for review.

Defamation is a communication that holds an individual up to contempt or ridicule thereby causing him to incur injury or damage.[5] See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111, at 771-85 (5th ed. 1984). At common law, the tort of defamation existed to redress and compensate individuals who suffered serious harm to their reputations due to the careless or malicious communications of others. See Milkovich, 497 U.S. at 11 ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (stating that the legislature has an interest in protecting and compensating individuals who are harmed by defamation). A cause of action for the tort of defamation exists today to protect individuals from those who would inflict an invidious and careless harm: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92-93 (1966) (Stewart, J., concurring). Additionally, defamatory statements are so egregious and intolerable because the statement destroys an individual's reputation: a characteristic which cannot be bought, and one that, once lost, is extremely difficult to restore.[6] See

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[5] The tort of defamation consists of two types of communication, libel and slander. Libel is usually a written communication while slander is generally an oral communication.

[6] In Milkovich v. Lorain Journal Co., 497 U.S. 1, 12 (1990), Chief Justice Rehnquist, writing for the Court, quotes a passage from act III, scene 3 of William Shakespeare's Othello. This passage artfully described the harm caused by a defamatory statement:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;

(continued...)

Curtis Publishing Co. v. Butts, 388 U.S. 130, 152 (1967) (noting that libel is as serious as the keeping of dangerous animals and the use of explosives); Hayes v. Todd, 15 So. 752, 755 (Fla. 1894) (discussing why there is such a compelling interest in preventing and redressing attacks upon an individual's reputation). Additionally, a defamatory statement is an action over which the defamed individual has little control. See generally Diane L. Zimmerman, Curbing the High Price of Loose Talk, 18 U.C. Davis L. Rev. 359, 360 (1985) ("In modern times, the potential for the careless, or worse, the intentional falsehood to destroy livelihoods, disrupt families, and damage friendships has been viewed almost without exception by English and American judges as so serious a wrong that no judicial system would dare abandon a remedy for it."); Joan E. Schaffner, Note, Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation, 63 S. Cal. L. Rev. 435, 440 (1990) (stressing the importance of redressing libelous injury).

Weighed against the individual's right to be free from false and defamatory assertions, however, is society's interest in encouraging and fostering vigorous public debate. Public debate is crucial to modern society because "the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In order to balance these competing needs, the privilege of "fair comment" was incorporated into the law of defamation. "Fair comment" protected statements that "concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm." Milkovich, 497 U.S. at 13-14.

The protection afforded to statements which "represented the actual opinion of the speaker" reached its high-water mark as a result of

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[6](...continued)
Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

dicta in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). In Gertz, 418 U.S. at 339-40, the United States Supreme Court stated:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

The Gertz dicta was read by many courts to establish that statements of opinion are not actionable. See, e.g., Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.), cert. denied, 479 U.S. 883 (1986); see also Ollman v. Evans, 750 F.2d 970, 974 n.6 (D.C. Cir. 1984) (citing federal cases recognizing an opinion privilege), cert. denied, 471 U.S. 1127 (1985); Jeffrey E. Thomas, Comment, Statements of Fact, Statements of Opinion, and the First Amendment, 74 Calif. L. Rev. 1001, 1009 n.52 (1984) (listing state cases recognizing an opinion privilege).

This court in Burns and the United States Supreme Court in Milkovich, however, specifically noted that there was no "wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich, 497 U.S. at 18; Burns, 659 P.2d at 1358 (noting that Gertz did not immunize all forms of opinion). The Court in Milkovich reasoned that in order to insure "uninhibited, robust, and wide-open" debate on matters of public concern, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation," or which "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," continues to receive full constitutional protection. Milkovich, 497 U.S. at 20 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)).

Milkovich and Burns thus provide the necessary framework to determine if a statement is protected.[7] This framework involves two

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[7] Many courts have set out slightly different tests for determining if a statement is protected. See John E. Nowak & Ronald D. Rotunda,

(continued...)

inquiries.[8] The first inquiry is whether the statement is "sufficiently factual to be susceptible of being proved true or false." Milkovich, 497 U.S. at 20. The second inquiry is whether reasonable people would conclude that the assertion is one of fact.[9] Id. The factors relevant to the second inquiry are: (1) how the assertion is phrased; (2) the context of the entire statement; and (3) the circumstances surrounding the assertion, including the medium through which the information is disseminated and the audience to whom the statement is directed. Burns, 659 P.2d at 1360; see Milkovich, 497 U.S. at 20 (holding that loose, figurative, or hyperbolic language may indicate that the statement could not reasonably be interpreted as a statement of fact); Falwell, 485 U.S.

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[7](...continued)
Treatise on Constitutional Law Substance & Procedure § 20.33 at 207-08 (2d ed. 1992) (listing cases); Post- Milkovich Defamation: Is Everyone Still Entitled To Their Opinion?, 65 St. John's L. Rev. 1105, 1112-14 (1991) (setting forth ways in which different courts have applied Milkovich); Libel Law--Opinion Privilege, 104 Harv. L. Rev. 219, 225-26 (1990) (noting lower court tests). The Supreme Court has noted that states are entitled to establish their own lows for redressing injury caused by defamation. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974) (A showing of fault to impose liability for defamatory statements "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation.").

[8] Whether allegedly defamatory language is constitutionally privileged is a question of law and a reviewing court must review the record de novo to insure that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression. Milkovich, 497 U.S. at 17; Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984); Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315, 318 (Colo. 1981).

[9] The reasonable person standard does not require that a majority of the community consider the statement a defamatory assertion of fact. "It is only necessary that the plaintiff be prejudiced in the eyes of a 'substantial and respectable minority' of the community." Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1357 (Colo. 1983), quoting Restatement (Second) of Torts § 559, cmt. e (1976).

at 50 (noting that the statement as a whole as well as the broader social context must be considered); see also Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 13-14 (1970); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974); White v. Fraternal Order of Police, 909 F.2d 512, 516 (D.C. Cir. 1990) (stating a court must examine the entire context of a publication and the dramatic intonations of the speaker). The factors are essential to insure that society's desire to protect speech and robust public debate does not create a license to commit character assassination.

III

Judge Keohane asserts that the court of appeals erred in concluding that Campbell's letters are constitutionally privileged. We disagree.

Campbell's letters, while published in the same edition of the Fremont Observer, appeared on separate pages, under different headlines, and under different pen names. Thus, each letter constitutes a distinct statement and must be assessed independently. See Spears Free Clinic & Hosp. for Poor Children v. Maier, 128 Colo. 263, 261 P.2d 489 (1953) (holding that each publication of a liable [sic] is a separate cause of action and should be separately pleaded).

A

Campbell's first letter, under the headline "Sick Pillars of the Community," appeared on page twelve of the November 8, 1988, edition of the Fremont Observer. In the Sick Pillars letter, Campbell poses a series of questions concerning the existence of a conspiracy as an explanation for how local "sickies" who practice medicine escape punishment for their crimes. The letter states: "It's bad enough for these criminal acts to have occurred, but for his fellow appointed 'pillar' to let him off with nothing as punishment, makes you wonder who is the sickest!" The letter also alleges that the legal and medical professions are corrupt, refers to "the rackets that are pulled in courtrooms and all the payoffs," and asserts that this corruption prevents professionals from policing their colleagues: "Does anyone seriously think there was any thing besides a conspiracy between the 3 Psychiatrists which are fellow doctors, the officer of the court and defense, to do anything but let this man off." The letter identifies money as the motive for the conspiracy, questions why the prosecutors in the Gallagher trial did not demand a jury, remarks that a bench trial "always means the judge has total control of the verdict," and states that under the circumstances, "did anyone expect that a guilty verdict would not be rendered?" Campbell closes the letter by stating: "When looking at a bucket of scrub water, you'll notice scum always rises to the top, and so it goes, it appears, in the social ladder of this community."

We conclude, as did the court of appeals, that the Sick Pillars letter contains a number of statements of verifiable fact about Judge Keohane.[10] For instance, the letter alleges that a conspiracy existed between Judge Keohane, three expert witnesses, and the defense to "let off" the defendant in the Gallagher trial. Further, the letter states that the motivation for the conspiracy was money. Both of these statements are capable of being proved true or false.

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[10] While the letter does not refer to Judge Keohane by name, the evidence at trial established that the letter was widely understood as referring to Judge Keohane and the Gallagher trial and that Campbell intended the letter to be so understood. As such, any defamatory meaning is properly regarded as a defamation of Judge Keohane. See Restatement (Second) of Torts § 564 (1977) ("A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.").

However, we also conclude that these statements, when viewed in the context of the letter as whole, cannot reasonably be interpreted as stating actual facts about Judge Keohane.[11] First, much of the letter is couched in terms of speculation and conjecture. For example, the letter states that "A community . . . would have to be even sicker" to retain an officer of the court who is guilty of participating in the activities described in the letter. Similarly, many of the facts asserted by Campbell are presented as conjecture about the events under discussion, i.e., "makes you wonder," "it appears," and "It [is] obvious."

The letter is replete with the sort of "imaginative expression" and "rhetorical hyperbole" the Supreme Court has regarded as particularly worthy of constitutional protection. See Milkovich, 497 U.S. at 20; Falwell, 485 U.S. at 46; Letter Carriers, 418 U.S. at 264. Such speculative commentary on matters of public concern is critical to the "uninhibited, robust, and wide-open" public debate essential to a democratic society, see New York Times v. Sullivan, 376 U.S. 254, 270 (1964), because it constitutes "a means of fueling a national discourse" and stimulates "public pressure for answers from those who know more." Milkovich, 497 U.S. at 35 (Brennan, J., dissenting).

Campbell expressed her views by using capital letters and multiple exclamation points ("HOW SICK!!!!!"); gross overgeneralization ("The 'upper crust' . . . will do anything for money"); and such colorful and exaggerated terms as "sickie," "terrorists," "sleaze," and "scum." The overall tone of the letter indicates that Campbell is venting her anger and frustration and is a signal that her words should not be taken literally or as reasoned accusations.

Moreover, considering the letter in the wider social context in which it appeared, a reasonable reader could not have taken Campbell's letter as actual assertions of fact, but would regard her statements as one citizen's suspicions and conjecture concerning well-publicized public events. As the court of appeals recognized, the readers of the Fremont Observer were familiar with the circumstances surrounding the Gallagher trial as well as other recent scandals concerning doctors and public officials.[12] Keohane, 859 P.2d at 299-300. In addition, the verdict in the Gallagher trial and the outcome of Judge Keohane's retention election were widely known public facts. Given this context, we hold that a reasonable reader of the Sick Pillars letter would have understood it as Campbell's expression of anger and frustration with the medical and legal community of Fremont County and her own conjectural explanation for the cause of that anger and frustration.

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[11] We recognize, however, that the fact that Campbell did not us her real name on either of the letters to the editor may be some evidence that she wished to damage Judge Keohane while attempting to avoid culpability.

The letter appeared in the editorial section of the paper, a traditional forum for debate, where intemperate and highly biased opinions are frequently presented and, absent credentials which make the author particularly credible, often times should not be taken at face value. See Ollman, 750 F.2d at 986; Reddick v. Craig, 719 P.2d 340, 345 (Colo. App. 1985).

Finally, we agree with the court of appeals that "to a reasonable reader, Campbell's statements would be received as Campbell's personal appraisal of generally known facts and not as an assertion of any firsthand knowledge otherwise unavailable to the audience." Keohane, 859 P.2d at 300 (citing Burns, 658 P.2d at 1360, and Dunlap v. Wayne, 716 P.2d 842, 849 (Wash. 1986)). There is nothing about Campbell individually, nor any suggestion in the Sick Pillars letter, that suggests knowledge of facts concerning Judge Keohane that were not generally known.

Thus, we hold that the Sick Pillars letter "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." Milkovich, 497

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[12] Throughout the 1980's, Cañon City and Fremont County in general were rife with allegations of corruption and misconduct in the legal and medical professions. A district attorney for the 11th Judicial District, which encompasses Cañon City and Fremont County, was arrested for distribution of a controlled substance, and an assistance district attorney resigned while being investigated for the same conduct. In addition, it was reported that two Cañon City doctors engaged in an improper medical procedure.

U.S. at 20. Accordingly, we conclude that the court of appeals properly held that the letter is constitutionally privileged and not actionable.

B

Campbell's second letter was printed under the headline "White Collar Crime, Gold Rush of the '80's." The letter begins: "A trial to the court which means no jury, is used and only a judge renders a decision seems to be open to suspect. At least where 'white collar crime' is concerned." Campbell then proposed a hypothetical situation detailing how a "judge is really in a position to clean up financially," if, "as an example," the judge approaches "an old buddy" who is suspected of a crime and stands to lose his license to practice medicine or law and offers to "find a way out" in exchange for a "home in another state" and some "six figure money." The letter continues that "[i]f this could be proven, it is . . . called extortion. Using your position, elected or appointed, to line your own pockets is despicable at best and a criminal act at worst." Campbell closed the letter as follows: "If you have an expensive lifestyle or an expensive drug habit, I guess this is the best you can do."

As in the case of the first letter, we agree with the court of appeals that the White Collar Crime letter contains verifiable facts or implications about Judge Keohane. See supra note 10. The letter states that a judge, in agreeing to find "a way out of [a defendant's] dilemma," is in a position to "really clean up financially" if the judge agrees to accept money and a new home out of state in exchange for leniency. "[T]he factual similarities between the Gallagher trial and the 'hypothetical' situation set forth in the letter implies that the judge in that case accepted a bribe." Keohane, 859 P.2d at 300. Whether or not Judge Keohane accepted a bribe in the Gallagher trial is a fact susceptible to verification.

Again, however, we are of the opinion that the statements, when considered in the context in which they appeared in the letter as well as the broader social context of their utterance, could not reasonably be interpreted as stating actual facts about Judge Keohane. First, the letter is replete with speculative and conjectural language, i.e., "A decision seems to be suspect"; "Say you have an old buddy"; "He can approach his old buddy"; "He can say you know Dr. So and So"; "If this could be proven." (emphasis added). This conjectural and speculative language alerts the reasonable reader that Campbell is offering nothing more than an elaborate hypothetical scenario as a possible explanation of the verdict in the Gallagher trial. See Burns, 659 P.2d at 1360 (language such as "in my opinion, while not determinative, may provide the reasonable listener with grounds to discount that which follows").

Moreover, given the well-publicized allegations of corruption against the medical and legal professions in Fremont County, a reasonable reader would realize that Campbell was offering a purely speculative leap from generally known facts to the realm of hypothetical explanation. The letter's placement in the editorial section of the paper also serves to put readers on notice that the assertions should be carefully scrutinized before being accepted as actual facts. Finally, nothing about Campbell nor her statements in the White Collar Crime letter indicates that her speculations were based on anything other than generally known facts about the Gallagher trial and the legal and medical professions of Fremont County in general.

Thus, we agree with the court of appeals that the content, tone, and context of the White Collar Crime letter establish that a reasonable person would not construe the letter as asserting actual facts. Instead, the letter was only an expression of Campbell's own hypothetical explanation for the verdict in the Gallagher trial. It is, therefore, constitutionally protected.

IV

The respondents assert that Stewart's remarks were also entitled to constitutional protection and that the damages awarded by the trial judge were improper. We disagree.

A

After the trial in which Dr. Gallagher was found not guilty by reason of impaired mental condition, Stewart uttered to Jurgens the remarks which ultimately led to the defamation action. The exchange between Stewart and Jurgens went as follows:

> Stewart: What do you think, was he paid in drugs or money?
>
> Jurgens: What?
>
> Stewart: Do you think he was paid off in cash or cocaine?
>
> Jurgens: Steve, you are a real piece of work.

Stewart's comments are capable of being proven true or false and therefore the first prong of the constitutional analysis indicates the statements may not be protected speech. The implication underlying the questions is clear: Stewart was asserting that Judge Keohane took a bribe.

A question, like a statement of belief or opinion, though not phrased in the form of a declaration of fact, may imply the existence of a false and defamatory fact. "[T]he issue of falsity relates to the defamatory facts implied by the statement." Milkovich, 497 U.S. at 20. Stewart specifically asked Jurgens what kind of bribe Judge Keohane took, and not if Judge Keohane had accepted a bribe. Stewart asked if Judge Keohane took "money or drugs" and "cash or cocaine." Stewart did not merely wish to inquire about Jurgens' thoughts concerning whether Judge Keohane had accepted a bribe; Stewart's questions implied that Judge Keohane had accepted a bribe and the only unresolved issue was how Judge Keohane had been paid.[13] Therefore, the implied statement underlying Stewart's question is "sufficiently factual to be susceptible of being proved true or false." Milkovich, 497 U.S. at 21.

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[13] The question posed by Stewart is analogous to the question: "Is John Jones a liar or a cheat?" Whether Jones is a liar or a cheat is not material to the underlying implication that Jones is dishonest.

Even if the statement is capable of being proved true or false, the statement must also lead a reasonable person to conclude that the speaker was communicating an actual fact. Burns, 659 P.2d at 1360. Under the facts of this case, a reasonable person would have concluded that Stewart was asserting an actual fact.

In this case, the phrasing of the assertion indicates that Stewart was stating a fact.[14] Stewart did not phrase the question in a manner suggesting that it was merely opinion or in such a way as to reasonably imply that the question of whether Judge Keohane took a bribe was still open to dispute. The common meaning of the words utilized by Stewart conveys that Judge Keohane took some type of bribe and Stewart wanted to know how he was paid. Id. at 1357 ("A finding that the language was used was defamatory must be predicated on . . . the common meaning of the words utilized."); see also Milkovich, 497 U.S. at 18 ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."). Additionally, the questions are not phrased in such a manner to indicate that they are merely rhetorical hyperbole. See Milkovich, 497 U.S. at 16-17; Falwell, 485 U.S. at 50; Bresler, 398 U.S. at 13-14; Letter Carriers, 418 U.S. at 284-86.

Second, the context of the statement also indicates that Stewart's questions implied fact. A reasonable person could have believed that as a councilman, Stewart could have been basing his implied assertion on facts that Stewart did not disclose in the offending question. See Burns, 659 P.2d at 1360 (noting that reasonable people could believe that a reporter was privy to inside knowledge of the undisclosed facts that supported the defamatory statement). When a city councilman speaks with a reporter, a reasonable person could believe that the question is based on defamatory facts "which the reporter has not disclosed to the audience but which the audience can reasonably expect to exist." Burns, 659 P.2d at 1358; see also Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.) ("Liability for libel may attach, however, when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader."), cert. denied sub nom. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977). Stewart's assertion that he was merely questioning whether Judge Keohane took a bribe is belied by his prior statement that Judge Keohane was "the best judge money can buy." Thus, placing Stewart's question in context indicates that Stewart implied that he knew the fact underlying the question, i.e., that Judge Keohane was "paid off."

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[14] We note that in determining whether Judge Keohane was defamed, the critical inquiry is not the meaning Jurgens gave to the questions. The statement is defamatory if Judge Keohane is prejudiced in the eyes of a substantial and respectable minority of the community. Burns, 659 P.2d at 1357.

Finally, the circumstances surrounding Stewart's questions to Jurgens imply that a reasonable person would find that Stewart was stating an actual fact. The numerous culpable acts committed by professionals in Cañon City before, during, and after the Gallagher trial indicates that reasonable people could be aware of official misconduct and would believe that Stewart was saying that Judge Keohane was just another culpable official taking bribes. Additionally, Stewart made his remarks to a reporter who had previously published the prior statement, "That's the best judge money can buy." This indicates that a reasonable person would be aware of the accusation of bribery underlying the defamatory questions. Most importantly, the question under these circumstances implied a criminal action and we have approved of a holding that accusations of criminal activity, 'even in the form of opinion, are not constitutionally protected.'" Burns, 659 P.2d at 1359 (quoting Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1307 (N.Y.), cert. denied, 434 U.S. 969 (1977)).

Many other courts have also held that allegations of illicit behavior, even if they are expressed as opinion, may support a defamation action if there is no adequate exposition of the underlying facts that support the allegedly defamatory statement. See Burns, 659 P.2d at 1359 (collecting cases).

The second inquiry--whether reasonable people would conclude that the assertion is one of fact--and the factors that weigh on that determination require application of an objective standard to the statement and circumstances surrounding the statement. The trial judge determined that these remarks were actionable and we should not substitute our interpretation of the evidence absent an erroneous determination.[15]

Therefore, Stewart's questions implied an assertion susceptible of being proved true or false and a reasonable person would have understood Stewart's questions as actually implying that Judge Keohane had accepted a bribe. Accordingly, we affirm the court of appeals.

B

Because we hold that Judge Keohane has an actionable slander claim, and because we did not grant certiorari to review whether Stewart's remarks constituted slander per se we must now turn to the issue of damages. The court of appeals held that Judge Keohane's proof of emotional damage was "sufficient to permit the jury to conclude that he suffered actual damage." Keohane, 859 P.2d at 302. We agree.

A public figure asserting a claim for slander per se must establish actual damages. Rowe v. Metz, 195 Colo. 424, 425-26, 579 P.2d 83, 84 (1978). Actual damages are inherently difficult to prove and may be established by proving harm to reputation, personal humiliation, mental anguish, or physical suffering. Bolduc v. Bailey, 586 F. Supp. 896, 901 (D. Colo. 1984). Because the damage issue does not affect significant constitutional interests, it is the prerogative of the individual states to decide what type of damages, including emotional harm alone, may be compensable in a defamation action.[16] Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976).

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[15] Although the determination of whether the statement is constitutionally protected is a matter of law, Milkovich, 497 U.S. at 17; Bose Corp., 466 U.S. at 499; Kuhn, 637 P.2d at 318; Sall v. Barber, 782 P.2d 1216 (Colo. App. 1989), we believe that the inquiry of how the statement was said, including the inflection of the speaker's voice, is a matter of fact best left to the trial judge to determine. Stewart's questions, however, do not reveal the inflection with which they were spoken. Given this limitation, and recognizing that the reasonable understanding of the remarks turns in part on that inflection, we are hesitant to completely ignore the ruling of the trial judge.

In this case, the evidence in the record consisted of evidence of Judge Keohane's emotional distress upon hearing Stewart's remarks from Jurgens. Although Jurgens testified that he did not understand Stewart's remarks as defamatory, nor did he tell them to anyone but Judge Keohane, neither fact is dispositive of the damage issue. See Burns, 659 P.2d at 1357 (noting that a communication needs only to tend to prejudice the plaintiff in the eyes of a substantial and respectable minority); Bolduc, 586 F. Supp. at 901 (the number of persons who hear the statement is relevant of the amount of and not the fact of damages). Here, Judge Keohane testified that he was "devastated" by the Daily Record article that stated Judge Keohane was "the best judge money can buy." The remarks that are the subject of this defamation action against Stewart, i.e., the query whether Keohane was bought off in money or drugs, caused Judge Keohane to feel worse.

Claims for damages for emotional distress are inherently difficult to prove with certainty, to rebut, and to evaluate. Rowe, 195 Colo. 424,

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[16] We recognize that several state courts have decided not to allow a plaintiff to recover damages for emotional harm in the absence of reputational damage. See Little Rock Newspapers, Inc. v. Dodrill, 660 S.W.2d 933, 935 (Ark. 1983) ("An action for defamation has always required [the] concept of reputational injury and recovery for mental suffering alone has not been allowed.); Gobin v. Globe Publishing Co., 649 P.2d 1239, 1243 (Kan. 1982) (stating that damage to reputation must be shown and additional damages are "parasitic"); France v. St. Clare's Hospital & Health Ctr., 441 N.Y.S.2d 79, 82 (Ny.Y. App. Div. 1981) ("Absent proof of harm to his reputation, a plaintiff may not recover on a claim of defamation . . . ."). We do not take this route, however, because emotional damages are merely one injury of many that may be proved to show actual damages. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Gertz, 418 U.S. at 323; Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025 (1975); see also CJI-Civ.3d § 22.12 (1989). Additionally, we note that damages are already extremely difficult to prove and to measure, and that restricting types of proof would only increase the difficult standard.

425-26, 579 P.2d 83, 84 (1978). As a result, the determination by the jury of both the existence and value, if any, of the damage should be given considerable discretion and should not be overturned unless the jury's award is grossly and manifestly excessive. See Dixson v. Newsweek, Inc., 562 F.2d 626, 631 (10th Cir. 1977) (stating that under Colorado law, the standard of review in libel actions is the same as in other cases); Bohlender v. Oster, 165 Colo. 164, 168, 439 P.2d 999, 1003 (1968) (holding that a jury award of damages will not be disturbed on review unless the amount of the award is grossly and manifestly inadequate or excessive). We hold that the evidence in the record is sufficient for the jury to have concluded that Judge Keohane suffered actual damages and we do not believe the award is grossly and manifestly excessive.

V

For the foregoing reasons, we affirm the court of appeals holding that Campbell's letters to the editor are not actionable and that Stewart's questions to Jurgens are actionable. We also affirm the court of appeals decision to uphold the damage award based on Stewart's questions.

CHIEF JUSTICE ROVIRA concurs in part and dissents in part, and JUSTICE LOHR and JUSTICE MULLARKEY join in the concurrence and dissent.

Keohane v. Wilkerson, 93SC382.

CHIEF JUSTICE ROVIRA, concurring in part and dissenting in part.

The majority concludes that the two letters written by Campbell are constitutionally privileged and thus, not actionable in a suit for defamation. I agree with that conclusion. I disagree, however, with the majority's holding that Stewart's statements to Jurgens imply a verifiable assertion of fact and could reasonably be understood as an assertion of actual fact. Accordingly, I dissent to Part IV(A) of the majority opinion. Though I think it is unnecessary to reach the question, I also disagree with the majority's holding in Part IV(B) that Keohane presented sufficient evidence to support the jury's award of damages against Stewart. Accordingly, I concur in part and dissent in part.

I

Throughout the 1980's, Cañon City and Fremont County in general were rife with allegations of corruption and misconduct in the legal and medical professions. A district attorney for the 11th Judicial District, which encompasses Cañon City and Fremont County, was arrested for distribution of a controlled substance, and an assistant district attorney resigned while being investigated for the same conduct. In addition, it was reported that two Cañon City doctors engaged in an improper medical procedure.

Subsequently, Dr. Gallagher, an anesthesiologist at St. Thomas More Hospital, was charged with sexually assaulting an anesthetized teenage patient. Articles published in a newspaper, the Cañon City Daily Record, indicated there was evidence that Gallagher had sexually assaulted his patient.[1]

After criminal charges were filed against Gallagher, the case was assigned to Keohane, who was then serving as a district court judge in the 11th Judicial District. Gallagher opted that his trial be to the court. Although Keohane had represented St. Thomas More Hospital from 1965-1980, he did not recuse himself. He did, however, disqualify a deputy district attorney whose wife was a hospital employee. After the prospect arose that Keohane might not be able to preside over the case due to an injury, Gallagher requested a continuance. Keohane was, however, able to preside over the case shortly after his surgery. The Cañon City Daily Record and other newspapers published these factual and procedural details regarding the Gallagher trial.

Gallagher was found not guilty by reason of impaired mental condition and was ordered to report to a state mental institution. No prison sentence was imposed. There was widespread outrage among the citizens of Cañon City concerning the verdict. A few days after the trial was completed, the citizens of the 11th Judicial District voted not to retain Keohane in office.

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[1] It was stated in the press that: Gallagher had destroyed his scrub suit before the crime was reported to the police; DNA testing revealed that the chances were one in 4.7 billion that someone other than Gallagher committed the assault; and Gallagher confided in another doctor and asked him not to reveal the crime.

The specific conduct giving rise to this lawsuit against Stewart is as follows. During the Gallagher trial while Stephen Stewart, a Cañon City councilman and spectator at the trial, was leaving the courtroom, Dwight Jurgens, a reporter for the Cañon City Daily Record, reportedly heard Stewart comment: "That's the best judge money can buy." While the trial was still in progress, Jurgens published an article about the trial which included Stewart's remark.

After the verdict in the Gallagher trial was announced, Stewart approached Jurgens and twice asked Jurgens if he thought Keohane had been "paid off" in drugs or money. These remarks were not published in the newspaper.

After the loss of his retention election, Keohane filed a defamation action against Stewart and others. His claim against Stewart for slander was based solely on the remarks made by Stewart to Jurgens after the verdict was announced. The trial court instructed the jury that Stewart's statements constituted slander per se. The jury awarded Keohane $15,000 in compensatory damages and $5,000 in punitive damages against Stewart. The award of punitive damages was subsequently reduced to $2,500 by the trial court.

On appeal, the court of appeals concluded that Stewart's remarks were not constitutionally protected because "a reasonable person could conclude that Stewart was implicitly asserting as actual fact that Keohane had accepted a bribe based upon undisclosed facts known to him as a city councilman." Keohane, 859 P.2d at 291. The Court of Appeals additionally held that the evidence was sufficient to permit the jury to conclude that Keohane suffered actual damages as a result of Stewart's comments to Jurgens.

II

Stewart argues on cross-appeal that the Court of Appeals erred in concluding that his comments to Jurgens are not constitutionally protected. I agree. When considered in light of the relevant factors set forth in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) and Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983), Stewart's remarks cannot reasonably be understood as stating actual facts about Keohane. Thus, I would hold that they are constitutionally privileged and therefore not actionable in a defamation suit.

Keohane based his defamation suit against Stewart on the following exchange between Stewart and Jurgens:[2]

Stewart: What do you think, was he paid in drugs or money?

Jurgens: What?

Stewart: Do you think he was paid off in cash or cocaine?

Jurgens: Steve, you are a real piece of work.

The Court of Appeals concluded that Stewart's comments were capable of being proved true or false. The court reached this conclusion on the grounds that:

> The undisputable implication of Stewart's question--do you think he took drugs or money? -- was that Keohane had been bribed. Stewart was not questioning whether Keohane had been bribed; he was merely asking how. Thus, the connotation that Keohane accepted a bribe of money or drugs is clear from Stewart's statements themselves, and such an allegation is capable of being proved true or false.

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[2] This account of Stewart's remarks is taken from Jurgens' testimony on direct examination at trial. Stewart denied having made the comments.

Keohane, 859 P.2d at 297. The majority reaches the same conclusion, with which I agree.

I disagree, however, with the majority's conclusion that Stewart's remarks could reasonably be understood as an assertion of actual fact.

Stewart made his comments to Jurgens shortly after the verdict in the Gallagher trial was rendered. As noted above, that verdict was unpopular and, as the evidence indicated, tended to verify the suspicions and derision felt by many in Fremont County regarding the legal and medical professions there. Thus, given the context of his statements, a reasonable listener could not understand the comments as assertions of actual fact about Keohane, but would recognize them as a figurative expression of Stewart's dissatisfaction with the verdict. As such, the statements are nothing more than a hyperbolic and figurative expression of Stewart's discontent and low regard for Keohane as a judge.

In this sense, Stewart's remarks are analogous to those at issue in Greenbelt Cooperative Publishing Association v. Bressler, 398 U.S. 6 (1970). In Bressler, a real estate developer was negotiating with the city council for a zoning variance while at the same time negotiating with the city over other land that the city sought to purchase from him. A public meeting was held relating to the land purchase, and a local newspaper reported that a number of citizens characterized the developer's tactics and bargaining position as "blackmail." The developer sued for libel. The Court rejected the argument that the statements were actionable on the ground that given the context of the speech, i.e., that it was made in the course of a heated public debate, a reasonable person would have interpreted the word "blackmail" figuratively rather than as a literal accusation that the plaintiff had committed a crime: "[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable." Id. at 14.

Likewise, in National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974), the Court considered the context of a Jack London quote defining a "scab" as, among other things, a traitor. The Court noted that the definition was published in the course of a labor dispute before concluding that a reasonable person would not have interpreted the term "traitor" to mean that the subject of the statement had actually committed treason. Rather, the Court concluded that statement was not actionable in a suit for defamation because the term could not reasonably be construed as a representation of fact, but used only in its "loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization." Id. at 284.

In concluding that the language at issue in Bressler and Letter Carriers was not actionable, the Court relied heavily on the fact that the statements were figurative and hyperbolic given the context in which they arose. Similarly, the context of Stewart's comments would notify the reasonable listener that they were nothing more than "vigorous epithets," "rhetorical hyperbole," or "loose and figurative" expressions of the perceived injustice and unreasonableness of the verdict in the Gallagher trial. As such, they cannot reasonably be understood as an assertion of actual fact.

Furthermore, the broader context of Stewart's remarks, coming shortly before Keohane was to face a retention election, supports the conclusion that they could not reasonably be construed as an assertion of actual fact. In the context of elections for public office, "hints of bribery, embezzlement, and other criminal conduct are not infrequent," and often times constitute nothing more than rhetorical hyperbole. Carr v. Warden, 206 Cal. Rptr. 162, 164 (1984) (quoting New York Times v. Sullivan, 376 U.S. 254, 273 n.14 (1964)).[3]

It is also significant that nothing about Stewart's comments themselves suggest that they were based on facts not generally known. Stewart was a city councilman for Cañon City. The Court of Appeals observed that "[a]s such, a reasonable person might expect him to have knowledge of the affairs of local government unavailable to the general public." Keohane, 859 P.2d at 297. On the other hand, it would be reasonable to believe that Stewart was not privy to undisclosed information concerning state judicial officers. He was not, after all, a member of the police department investigating alleged criminal activity nor did he occupy a position responsible for overseeing the judicial officers of the 11th Judicial District. Thus, his position as a public servant is not particularly relevant with regard to whether a reasonable person could believe that he had knowledge of undisclosed information concerning Keohane, and nothing in the comments themselves suggest any awareness of such information.

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[3] The majority states that because "Stewart made his remarks to a reporter who had previously published the prior statement, 'That's the best judge money can buy'," this fact "indicates that a reasonable person would be aware of the accusations of bribery underlying the defamatory question." Maj. op. at 22. I fail to see why the objective, reasonable person would necessarily be a reader of the Cañon City Daily Record, and would have read Jurgens' prior article.

The majority concludes that a reasonable person could have believed that as a councilman, Stewart's remarks were base on implied assertions of fact that were not disclosed in his comments. Remarkably, the majority reaches this conclusion on the grounds that "[w]hen a city councilman speaks with a reporter, a reasonable person could believe that the question is based on defamatory facts 'which the reporter has not disclosed to the audience but which the audience can reasonably expect to exist.'" Maj. op. at 21. The question here is not whether Jurgens, the reporter, had undisclosed information relating to Stewart's remarks. The question is whether Stewart's remarks themselves imply a factual predicate undisclosed by those remarks. That is to say, Jurgens' knowledge is entirely irrelevant to evaluating Stewart's comments. Moreover, Jurgens was the audience here, and there was no other audience which could reasonably have believed that Stewart's comments were based on undisclosed facts known to Jurgens.

Finally, the medium through which these comments were communicated must be taken into account, Burns, 659 P.2d at 1360, particularly because the spoken word may convey a different meaning than written words.

> Because a court must examine the entire context of a publication, the court should also consider dramatic intonations by the announcer in determining whether the broadcast conveys a defamatory meaning. Television [like all speech] touches more senses than does the print media, and the standard for finding defamation cannot be woodenly applied without taking into account the kind of medium by which the message was delivered.

White v. Fraternal Order of Police, 909 F.2d 512, 526 (D.C. Cir. 1990) (citations omitted). For this reason, it is critical to recognize that the reasonableness of understanding these remarks as assertions of actual fact depends in part on the inflection with which they were uttered. For instance, if they were spoken with the inflection of a statement, it is easier to interpret them as an assertion of fact that Keohane had been bribed and raising the question only of the form of that bribe. If, however, Stewart made his remarks with the inflection of a question, the reasonable interpretation of the remarks is simply that of an inquiry regarding whether Jurgens thought Keohane had accepted either drugs or money in the Gallagher trial.

Of course, reading Stewart's remarks does not reveal the inflection with which they were spoken. Given this limitation, and recognizing that the reasonable understanding of the remarks turns in part on that inflection, we are faced with a difficult task. In light of this dilemma, it seems appropriate to consider Jurgens' interpretation of Stewart's comments, as he is the only person who actually heard them.[4] To the extent that his understanding of those remarks may reveal the inflection with which they were spoken, they are relevant in determining how a reasonable person would have understood them. See Restatement (Second) of Torts § 563, cmt. c (1977) ("It is not enough that the language is reasonably capable of a defamatory interpretation if the recipient did not in fact so understand it.").

Jurgens testified that he had not "the slightest clue" of what Stewart meant by his remarks. He further testified that he did not take the remarks seriously and stated that he "never knew" when Stewart was being serious or just saying something for effect. In his sworn affidavit, Jurgens stated that after sharing Stewart's remarks with two other newspaper employees, "[t]he three of us just shook our heads at what we considered Councilman Stewart's foolish remarks . . . ."[5] Thus, Jurgens, the only person who actually heard Stewart's remarks, did not understand what they meant, did not take them seriously, and regarded them as foolish.[6] In short, Jurgens did not understand the remarks as an assertion of actual fact about Keohane. In my judgment, this interpretation is relevant under the facts of this case in determining whether Stewart's comments reasonably could be understood as an assertion of actual fact. See Sigmon v. Womack, 279 S.E.2d 254, 257 (Ga. Ct. App. 1981) (in order to effect the publication of a libel, there must be a reading of it and an understanding of its meaning by the person reading it).

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[4] In considering Jurgens' understanding of Stewart's remarks, I do not suggest that the subjective understanding of the recipient of an allegedly defamatory statement is dispositive as to that statement's reasonable meaning, nor do I imply that such a subjective understanding will always be relevant. Rather, I conclude simply that under the facts of this case, Jurgens' interpretation of the comments should be considered and, based on the other considerations detailed above, support the conclusion that Stewart's remarks cannot reasonably be understood as an assertion of actual fact about Keohane.

The phrasing of Stewart's comments, when considered in context, as well as Jurgens' interpretation of those remarks, lead to the conclusion that they could not reasonably be understood as an assertion of actual fact -- as a matter of law.[7] Accordingly, I conclude that Stewart's remarks are constitutionally privileged.

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[5] Oddly, the majority seeks to discount the significance of Jurgens' understanding of Stewart's remarks on the grounds that "in determining whether Judge Keohane was defamed, the critical inquiry is not the meaning Jurgens gave to the questions. The statement is defamatory if Judge Keohane is prejudiced in the eyes of a substantial and respectable minority of the community." Maj. op. at 20 n.14. Be that as it may, the question here is not whether Keohane has been defamed but rather, whether Stewart's comments are constitutionally privileged.

[6] Jurgens' affidavit also states that he was unable to characterize the comments as being said in jest, in an accusatory manner, or in a conversational tone because he could never tell if Stewart was saying something for effect or because he sincerely believed it.

III

Though I do not think it necessary to decide whether sufficient evidence was presented on the question of damages to sustain the jury's award given that Stewart's comments are constitutionally privileged, I am compelled to state my disagreement with the majority's resolution of this issue.

Ironically, after emphasizing at length the need and importance of protecting the reputation of defamed persons -- the raison d'etre of defamation law -- the majority concludes that Keohane presented sufficient evidence to support the jury's award of damages in spite of the fact that absolutely no evidence was presented that Keohane's reputation had been harmed as a result of Stewart's comments to Jurgens. To the contrary, Jurgens, the only person who heard Stewart's comments, testified that they in no way changed his favorable opinion of

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[7] The majority correctly states the law when it recognizes that "whether the statement is constitutionally protected is a [question] of law . . . ." Maj. op. at 23, n.15 (citing Milkovich). Oddly, however, the majority also states that under the Milkovich test, we should not "substitute our interpretation of the evidence [for that of the trial court's] absent an erroneous determination." Id. Not surprisingly, the majority cites no authority for this latter conclusion.

Questions of law are reviewed de novo by this court, and no deference is owed to the trial court's "interpretation of the evidence." See Bloomer v. Board of County Comm's, 799 P.2d 942, 944 (Colo. 1990), rev'd on other grounds, Bertrand v. Board of County Comm'rs, 872 P.2d 223 (Colo. 1994) (appellate courts need not defer to trial courts when reviewing questions of law). Moreover, it simply does not make sense to say that we should not substitute our interpretation of the evidence for that of the trial court's unless the trial court's legal conclusion is wrong. The only way for a reviewing court to decide whether a trial court incorrectly determined whether a statement is constitutionally privileged is to examine the evidence and come to a conclusion based on that evidence.

Keohane.[8] The only evidence of damages presented by Keohane was that after learning of Stewart's remarks to Jurgens, he felt "worse" than he had before. In my opinion, this is insufficient as a matter of law to support an award of damages.

In Time, Inc. v. Firestone, 424 U.S. 338 (1976), the United States Supreme Court held that the decision of whether emotional harm alone is compensable in a defamation action is to be left to state law. This conclusion was premised on the recognition that defamation is a creature of state common law and, in light of other constitutional safeguards, restrictions on emotional damages were unnecessary to protect First Amendment liberties.

Since that decision, several states have refused to allow recovery for emotional harm in the absence of a showing of reputational damages. See, e.g., Little Rock Newspapers, Inc. v. Dodrill, 660 S.W.2d 933 (Ark. 1983); Gobin v. Globe Publishing Co., 649 P.2d 1239 (Kan. 1982); France v. St. Clare's Hospital and Health Center, 441 N.Y.S. 2d 79 (N.Y. App. 1981). In addition, a number of legal scholars have concluded that allowing damages for emotional harm alone poses a significant threat to free speech, particularly when permitted to function as the equivalent of presumed damages. See, e.g., W. Page Keeton, Prosser and Keeton on The Law of Torts 844-45 (5th ed. 1984) ("The law of defamation has been developed primarily for the protection of the reputational interest. This being so, it would appear to be somewhat anomalous to permit a plaintiff to recover actual damages without [showing] actual harm to his reputation, based either on a presumption or proof of such harm."); Rodney A. Smolla, The Law of Defamation § 9.06 (1994); David A. Anderson, Reputation, Compensation, and Proof, 25 Wm. & Mary L. Rev. 747 (1984).

As the majority has recognized, damage to reputation is the essence of a defamation action. Maj. op. at pp. 6-9. See also Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971); Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F. Supp. 1219, 1233 (D. Colo.

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[8] It goes without saying that the subsequent publication of those remarks resulting from Keohane bringing this lawsuit cannot form the basis for concluding that Keohane's reputation has been damaged as a result of those statements.

1976). As such, courts have recognized that the harm that the defendant's speech has caused to the plaintiff's reputation is critical. Bolduc v. Bailey, 586 F. Supp. 896, 90001 (D. Colo. 1984) ("The gravamen of an action for defamation is the damage to one's reputation in the community . . . .") (quoting Gobin, 649 P.2d at 1243).

This is particularly true in an action involving a public official or speech concerning an issue of public concern. The Supreme Court has observed on several occasions that hurt feelings are an inevitable risk of public office and do not outweigh the compelling interest in free speech. As Justice Powell noted,

> [a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case . . . . [T]hose classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved . . . . [T]hey invite attention and comment.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974). It is inevitable that such comments will not always be "reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic and sometimes unpleasantly sharp attacks'." Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

In my judgment, permitting public officials to recover damages solely for emotional distress in a defamation action will result in a chilling of speech and discouragement of public debate. Knowing that they can be sued for nothing more than hurting the feelings of public officials, citizens will be more likely to remain silent on issues of public interest. Such an outcome clearly is contrary to the value placed on vigorous political debate and the principles which the First Amendment is intended to further.

The majority, however, concludes that a showing of emotional harm is itself sufficient to support an award of damages in an action for defamation on the grounds that "[c]laims for damages for emotional distress are inherently difficult to prove with certainty, to rebut, and to evaluate." Maj. op. at 25. In my opinion, the fact that proof of emotional distress is difficult lends no support for the rule adopted by the majority. This observation is irrelevant to the question of whether such a showing alone is sufficient to support an award of damages in a suit for defamation. The fact that such harm is difficult to rebut, however, supports my conclusion.

Shifting the focus of a defamation action from an objective assessment of reputational harm to a highly subjective inquiry into the plaintiff's emotional state poses a considerable risk that a claim which is, in truth, not worthy of compensation, will be compensated. Without having to prove harm to reputation, a plaintiff could prevail and be awarded significant damages based on nothing more than self-serving testimony of hurt feelings, personal humiliation, and mental anguish -- particularly in light of the fact that such harm is, as the majority recognizes, so difficult to rebut. See The Law of Defamation at § 9.06(5)(b).

The point clearly is illustrated by the facts of this case. Keohane was awarded $20,000 in damages against Stewart based on his testimony that Stewart's comments made him feel "worse" than he had before. How could such testimony be rebutted by defendant? To allow the jury verdict to stand on the basis of such vague, unsubstantiated, and self-serving testimony is contrary to the very reason for defamation law -- the protection of reputational harm, and will encourage litigation intended to assuage "hurt feelings" at the expense of free speech liberties.[9]

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[9] One need not go so far as to imply that emotional harm is, in and of itself, not worthy of compensation in light of the risks it imposes on free speech liberties. To the contrary, the point is simply that suits seeking damages solely for emotional harm should not be brought as defamation actions but should be pursued as actions for the intentional or negligent infliction of emotional distress. Prosser and Keeton on The Law of Torts at 845.

Colorado law permits a plaintiff to recover for intentional infliction of emotional distress upon a showing (1) that the defendant engaged in "extreme and outrageous" conduct; (2) that the defendant

(continued...)

I would hold that the requirement that a public official plaintiff in a defamation case show actual damages, see maj. op. at 24, cannot be fulfilled by showing only emotional harm. Harm to reputation must be established. As commentators have pointed out, permitting plaintiffs to prove actual damages merely by testifying as to their emotional distress defeats the purpose of requiring a showing of actual harm:

> Because self-serving testimony of personal humiliation and mental anguish will almost always be available to the plaintiff (and in most cases, the testimony will be genuinely sincere) those states that permit emotional distress standing alone to support an award of actual damages for defamation are in truth virtually eliminating proof of "actual harm" as a meaningful barrier to a plaintiffs' recovery.

The Law of Defamation at § 9.06[5][b]. See also Prosser & Keeton at 844; Time, Inc. v. Firestone, 424 U.S. at 475 n.3 ("It seems clear that by allowing this type of recovery the State had subverted whatever

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[9](...continued)
intended to cause the plaintiff severe emotional distress (or acted with reckless disregard for the plaintiff's emotional state); and (3) the plaintiff did in fact incur severe emotional distress as a result of the defendant's conduct. CJI- Civ. 3d 23:1 (1989). One reason for requiring a plaintiff to show outrageous conduct and severe suffering is to eliminate trivial claims. Prosser and Keeton on the Law of Torts at 56. Likewise, a plaintiff may prevail in an action for negligent infliction of emotional distress only if the defendant placed the plaintiff in fear of his own safety, and the plaintiff suffered "physical consequences or long continued emotional disturbance" as a result. CJI - Civ 3d 9:3. These stringent requirements are imposed in recognition of the fact that claims for emotional distress are easy to claim but difficult to verify or rebut.

As such, a defamed plaintiff seeking compensation for emotional distress would not be rendered helpless as a result of the rule I espouse but rather, would be required to prove the elements of the actual tort alleged. To hold as the majority does not only imperil free speech, it converts the law of defamation into a weak-kneed surrogate for claims of intentional or negligent infliction of emotional distress.

protective influence the 'actual injury' stricture may possess") (Brennan, J., dissenting).

Permitting evidence of emotional harm alone to establish actual damages effectively eviscerates the actual damages requirement and in so doing, poses such a threat to First Amendment liberties that I cannot join in its adoption. Accordingly, I conclude that Keohane failed to present sufficient evidence to support the jury's award of damages.

I respectfully dissent.

I am authorized to say that Justice Lohr and Justice Mullarkey join in this concurrence and dissent.

SUPREME COURT, STATE OF COLORADO
CASE NO. 93SC382
CERTIORARI TO THE COLORADO COURT OF APPEALS, 91CA1840
EL PASO DISTRICT COURT, 91CV2042

ORDER OF COURT

PAUL J. KEOHANE,

Petitioner/Cross-Respondent,

v.

STEPHEN STEWART,

Cross-Petitioner,

and

GROVER K. WILKERSON and TERRI CAMPBELL,

Respondents.

Upon consideration of the Cross-Petitioner's Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Cross-Petitioner's Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 6, 1994.
Chief Justice Rovira, Justice Lohr, and Justice Mullarkey would grant the Petition.

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Clerk of El Paso County District Court
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Patrick H. Stanford, Clerk
Colorado Court of Appeals

COLORADO COURT OF APPEALS April 8, 1993
No. 91CA1840

Paul Keohane,

Plaintiff-Appellee,

v.

Grover K. Wilkerson, Stephen Stewart, and Terri Campbell,

Defendants-Appellants.

Appeal from the District Court of El Paso County
Honorable Richard v. Hall, Judge
No. 91CV2042

Division I
Opinion by JUDGE DAVIDSON
Metzger and Briggs, JJ., concur

JUDGMENT AFFIRMED,IN PART
AND REVERSED IN PART

Paul J. Keohane, Pro Se

Holland & Hart, A. Bruce Jones, Stephanie D. Welsh, Denver, Colorado, for Defendants-Appellants

In this action for defamation, defendants, Stephen Stewart, Terri Campbell, and Grover Wilkerson, appeal from a judgment entered upon a jury verdict in favor of plaintiff, Paul Keohane. We affirm in part and reverse in part.

At the time this action arose, Keohane was serving as a district court judge in Fremont County. In late October and early November of 1988, Keohane presided over a highly publicized trial to the court in which a local anesthesiologist accused of sexually assaulting a teenage patient was found not guilty by reason of impaired mental condition (the Gallagher trial).

Following the verdict in the Gallagher trial, defendant Stewart, a Cañon City councilman and spectator at the trial, allegedly approached Dwight Jurgens, a reporter for the Cañon City Daily Record, and asked, "What do you think, was he paid off with drugs or money?" and, "Do you think he was paid off in cash or cocaine?" These remarks were not republished, and Jurgens allegedly told no one else but plaintiff of this exchange.

On November 8, 1988, the day of Keohane's retention election, two letters written by defendant Campbell under assumed names were published in the Fremont Observer, a local weekly newspaper. Although neither letter referred to Keohane by name, both referred to collusion and pay-offs between judges and doctors.

Keohane was not retained in the November election, and subsequently, he filed this defamation action against thirteen named defendants, including Stewart, Campbell, and Wilkerson, the editor of the Fremont Observer.

Over the objections of Stewart and Wilkerson, venue was ordered changed to the El Paso County district court. At the conclusion of the trial, only the claims against Stewart, Campbell and Wilkerson were submitted to the jury. The Court ruled that Stewart's statements to Jurgens constituted slander per se and instructed the jury accordingly. With respect to Campbell's letters, the Court instructed the jury as to libel per quod. The jury then returned a verdict in favor of Keohane, awarding him $15,000 in compensatory damages and $5,000 in punitive damages against Stewart, $25,000 in compensatory damages and $1,000 in punitive damages against Campbell, and $25,000 in compensatory damages and $2,500 in punitive damages against Wilkerson. The award of punitive damages against Stewart was subsequently reduced to $2,500 by the trial court.

On appeal, defendants contend, among other things, that (1) neither Stewart's comments nor Campbell's letters could reasonably be interpreted as implying factual assertions; (2) the statements, when considered in context, are not defamatory; (3) Keohane presented insufficient proof of damages; and (4) the trial court erred in ordering venue changed to the El Paso County district court. We determine that Campbell's letters to the editor were constitutionally protected speech and thus are not actionable. Otherwise, we affirm.

I.

In Living Will Center v. NBC Subsidiary (KCNC-TV), Inc., _____ P.2d _____ (Colo. App. No. 92CA0139, February 11, 1993), we addressed the issue of the actionability of statements for the first time since the U.S. Supreme Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695, 111 L.Ed.2d 1 (1990). However, our opinion in that case was limited to the issue of whether the substance or gist of a television broadcast contained or implied assertions capable of being proved false. Because defendants raise additional issues which we have not yet fully considered in the wake of Milkovich, we must first address the proper standards for determining when a claim for defamation is actionable.

Whether allegedly defamatory language is constitutionally protected is a matter of law for the court to determine. See Sall v. Barber, 782 P.2d 1216 (Colo. App. 1989). In order to make sure that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression, a reviewing court must make an independent examination of the entire record. Milkovich v. Lorain Journal Co., supra; see Living Will Center v. NBC Subsidiary (KCNC-TV), Inc., supra.

Prior to Milkovich, statements of "pure" opinion were recognized as having constitutional privilege, and thus were not actionable for defamation in Colorado. See Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983); Bucher v. Roberts, 198 Colo. 1, 595 P.2d 239 (1979). This privilege was premised on dictum in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789, 805 (1974), in which the Court stated:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

However, not all statements of opinion enjoyed constitutional privilege. As the Burns court noted, "opinions may lose their constitutional protection when 'the average reader or listener or viewer perceives the comment as essentially an assertion of fact.'" Burns v. McGraw-Hill Broadcasting Co., supra, at 1360.

Accordingly, in considering if the statement was actionable, our Supreme Court adopted a three-part analysis to determine whether the statement constituted "pure" opinion or a factual assertion: first, the court examined the phrasing of the statement to determine whether it would reasonably be interpreted as rhetorical hyperbole rather than fact; second, the Court examined the effect of the entire statement, not just the objectionable word or phrase, in context; and third, the Court considered the circumstances surrounding the statement, including the medium through which it was disseminated and the audience to whom it was directed. See Burns v. McGraw-Hill Broadcasting Co., supra; see also Sall v. Barber, supra.

However, in Milkovich, the Supreme Court rejected the constitutional distinction between opinion and fact. In that case, Milkovich, then a high school wrestling coach, had testified at a hearing concerning an altercation that broke out at a high school wrestling meet in which several people were injured. Following the hearing, an article appeared in the local newspaper criticizing the conduct of the coach and stating that: "Anyone who attended the meet or [an] impartial observer, knows in his heart that [Milkovich] lied at the hearing after [having] given his solemn oath to tell the truth." Subsequently, Milkovich commenced a defamation action against the newspaper, alleging that the article accused him of perjury and thereby damaged his reputation.

Noting that statements of opinion may nevertheless imply a false assertion of fact and that, in such cases, expressions of opinion can cause as much damage to reputation as an outright assertion of fact, the court refused to recognize the dichotomy between "fact" versus "opinion" that emerged from Gertz. The Court flatly rejected the existence of any "so-called opinion privilege wholly in addition to the protections we have already found to be guaranteed by the First Amendment." (emphasis in original) Milkovich v. Lorain Journal Co., supra, 497 U.S. at 24, 110 S. Ct. at 2708, 111 L.Ed.2d at 21.

However, the court reasoned that in order to ensure "uninhibited, robust, and wide-open" debate on matters of public concern, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation," or which "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," continues to receive full constitutional protection. Milkovich v. Lorain Journal Co., supra, 497 U.S. at 20, 110 S.Ct. at 2706, 111 L.Ed.2d at 18-19 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)). Finding that "the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false," and that the language and tenor of the newspaper column did not "negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury," Milkovich v. Lorain Journal Co., supra, 497 U.S. at 21, 110 S.Ct. at 2707, 111 L.Ed.2d at 19, the Supreme Court reversed the opinion of the Ohio Supreme Court which had dismissed the appeal on the grounds that the alleged defamatory statement was opinion and, therefore, not actionable.

Thus, after Milkovich, whether a statement is characterized as a "fact" or "opinion" is no longer a relevant inquiry in determining whether it may be constitutionally privileged. Rather, the relevant inquiry is whether the statement could be reasonably understood as declaring or implying a provable assertion of fact. See Milkovich v. Lorain Journal Co., supra.

Hence, in considering whether a particular statement is actionable as libel or slander, we must first determine whether a reasonable factfinder could conclude that a statement contains or implies an assertion susceptible of being proved false. See Milkovich v. Lorain Journal Co., supra; see also Living Will Center v. NBC Subsidiary (KCNC-TV), Inc., supra. This necessarily requires us to make two separate inquiries: (1) does the statement contain or imply a verifiable fact about the plaintiff, and (2) is the statement reasonably susceptible to being understood as an actual assertion of fact.

In making these inquiries, we are not limited to the literal meaning of the words contained in the statement. Although Milkovich eschews fact/opinion terminology, it does not require us to abandon the multi-factored analysis previously employed to determine the actionability of a statement. See Phantom Touring Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir. 1992). The factors identified by the Burns court, i.e., the phrasing of the statement, the context in which it appears, and the surrounding circumstances of its publication, are relevant and must be considered in determining whether the statement could reasonably be understood as containing an express or implied assertion of fact. See Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc., 738 F. Supp. 1499 (D. S.C. 1989). In addition, we must consider the impression created by the words as well as the general tenor of the conversation or article from the point of view of the reasonable person. See Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 566 N.Y.S.2d 906, 567 N.E.2d 1270 (1991).

If, in light of these factors, a statement does not contain or imply a verifiable fact, it is not actionable. Likewise, if the statement does contain or imply a verifiable fact, but is not reasonably susceptible to interpretation as a declaration of fact, it will receive full constitutional protection and no action for defamation will lie. Conversely, a statement, even if it is phrased as an opinion, will not enjoy constitutional protection if the court concludes that its substance or gist could reasonably be interpreted as declaring or implying an assertion of fact. See Milkovich v. Lorain Journal Co., supra.

If the court determines that the statement is actionable, the claim may then be submitted to the factfinder for a determination of whether the statement is defamatory. See Living Will Center v. NBC Subsidiary, (KCNC-TV), Inc., supra (whether a statement makes a factual allegation and whether the statement is defamatory are separate and distinct issues).

Bearing these principles in mind, we address the specific issues raised by defendants in this appeal.

II.

Defendants first contend that their statements are constitutionally protected under the First Amendment and therefore are not actionable. Thus, they argue, the trial court erred in submitting Keohane's defamation claim to the jury. We do not agree that Stewart's statements were privileged. However, we do conclude that Campbell's letters are constitutionally protected speech and, therefore, are not actionable.

A.

Initially, we disagree with defendants' contention that Stewart's statements to Jurgens were ambiguous, open-ended questions which cannot be proven false and which were not asserted as fact.

We have little trouble concluding that Stewart's statements were capable of being proven true or false. The undisputable implication of Stewart's question – do you think he took drugs or money? – was that Keohane had been bribed. Stewart was not questioning whether Keohane had been bribed; he was merely asking how. Thus, the connotation that Keohane accepted a bribe of money or drugs is clear from Stewart's statements themselves, and such an allegation is capable of being proved true or false.

Contrary to defendant's suggestion, the phrasing of a statement as a "hypothetical" question does not necessarily clothe it in constitutional privilege. A question, like a statement of belief or opinion, although not phrased as an actual declaration of fact about an individual, may be actionable if it implies the existence of a false and defamatory fact. "[T]he issue of falsity relates to the defamatory facts implied by a statement." (emphasis deleted) Milkovich v. Lorain Journal Co., supra, 497 U.S. at 20, 110 S.Ct. at 2706, 111 L.Ed.2d at 18. Thus, if a "hypothetical" question reasonably implies a defamatory factual assertion, it may be actionable.

In addition, we are persuaded that, viewing the statement in context, a reasonable person could conclude that Stewart was asserting, as actual fact, that Keohane had accepted a bribe. See Milkovich v. Lorain Journal Co., supra, 497 U.S. at 18, 110 S.Ct. at 2705-2706, 111 L.Ed.2d at 17-18 ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth.").

The record shows that Stewart was an elected official who occupied a position of trust in the Cañon City area. As such, a reasonable person might expect him to have knowledge of the affairs of local government unavailable to the general public. Moreover, Stewart had publicly stated that Keohane was "the best judge money can buy" following an exchange with him during the Gallagher trial. This earlier comment, prior to the verdict in the Gallagher trial, would tend to reinforce the view that Stewart was seriously maintaining that Keohane had accepted a bribe, rather than merely positing a speculative explanation for the verdict.

Thus, viewing Stewart's statements in context, we are persuaded that a reasonable person could conclude that Stewart was implicitly asserting as actual fact that Keohane had accepted a bribe based upon undisclosed facts known to him as a city councilman. See Milkovich v. Lorain Journal Co., supra (newspaper column was written so as to imply that reporter's presence at certain events made him uniquely situated to draw the inference that the plaintiff had lied); Burns v. McGraw Hill Broadcasting Co., supra, 659 P.2d at 1360 ("[R]easonable people could have believed that the reporter had inside knowledge of the facts which would support her charge that [plaintiff] 'deserted' [her husband].").

Although Jurgens, the only party who heard Stewart make the comments, testified that he was unsure whether Stewart thought that Keohane had accepted a bribe, such testimony is not dispositive. Rather, we must determine whether a reasonable person could conclude that the speaker was seriously maintaining a factual assertion. Because we conclude that a reasonable person could, the trial court did not err in submitting the issue to the jury.

B.

Next, defendants contend that Campbell's letters were not actionable for defamation because they contain no statements or implications reasonably susceptible to interpretation as assertions of fact. The letters, they argue, were "phrased in terms of apparency," indicating that Campbell was simply "speculating" as to misconduct by

Keohane. When considered in context, they contend, the letters are properly seen as "'loose, figurative, and hyperbolic' expressions of [Campbell's] disgust for the way prominent figures in the community had behaved." Finally, they emphasize that the letters appeared in the "letters to the editor" section of the Fremont Observer in the context of a retention election. Thus, they argue, the trial court erred in determining that the letters were actionable. We agree.

Although both letters were published in the same edition of the newspaper, they appeared on different pages, under different headlines, and under different pen names. Therefore, each letter constitutes a separate statement and must be considered independently. See Spears Free Clinic & Hospital for Poor Children v. Maier, 128 Colo. 263, 261 P.2d 459 (1953).

1. The "Sick Pillars" Letter

The first of Campbell's letters, entitled Sick Pillars of the Community, appeared on page 12 of the November 8, 1988, edition of the Fremont Observer. The letter opens with a reference to the Gallagher trial and the trial of another local figure, stating: "The two local 'sickies' in our community that [sic] got caught have not and may never lose their licenses to practice medicine." The letter then goes on to state:

> It's bad enough for these criminal acts to have occurred, but for his fellow appointed "pillar" to let him off with nothing as punishment, [sic] makes you wonder who is the sickest!
>
> . . . .
>
> Does anyone seriously think there was anything besides a conspiracy between the 3 Psychiatrists which [sic] are fellow doctors, the officer of the court and defense, to do anything but let this man off?
>
> . . . .

> We've all heard of the rackets that are pulled in courtrooms and all the payoffs, but does it have to be so obvious? The "upper crust", it appears will do anything for money.
>
> . . . .
>
> Why did the prosecutors in Dr. Gallagher's case not demand a jury trial? Trial to the Court always means the judge has total control of the verdict. Under these circumstances did anyone expect that a guilty verdict would not be rendered?

Here again, we conclude that this letter contains several statements or implications of verifiable fact about Keohane. For example, on its face, the letter states that a conspiracy to "let off" the defendant existed in the Gallagher trial and that the motive for the conspiracy was money. In addition, the letter implies that Keohane was involved in this conspiracy. Each of these statements or implications is capable of being proved true or false.

However, viewing the letter in context, we conclude that it is not reasonably susceptible to an interpretation that it is maintaining factual assertions; rather, the letter can only be reasonably interpreted as suggesting a personal conclusion based upon facts which were accessible and well known to the community at the time of publication. Therefore, we conclude that it is not actionable.

When a party makes a speculative or conjectural statement based upon truthful, nondefamatory facts which are disclosed or otherwise generally known to the audience, the statement cannot reasonably be understood as an assertion of fact. See Dunlap v. Wayne, 105 Wash.2d 529, 716 P.2d 842 (1986); see also Milkovich v. Lorain Journal Co., supra; Burns v. McGraw-Hill Broadcasting Co., supra; Seible v. Denver Post Corp., 782 P.2d 805 (Colo. App. 1989); Brooks v. Paige, 773 P.2d 1098 (Colo. App. 1988); Restatement (Second) of Torts §566, comment c (1977).

In such a case, the author or speaker does not implicitly assert any firsthand knowledge inaccessible to the audience. To the contrary, if the audience is appraised of the facts underlying a speculative assertion, it is not required to share in the conclusion of the author and may judge the truth of the statement or draw conclusions for itself. See Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); National Ass'n of Government Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979); Dunlap v. Wayne, supra.

Such speculative commentary on matters of public concern is critical to the "uninhibited, robust, and wide-open" public debate essential to a democratic society, see New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686, 701 (1964), as it provides "a means of fueling a national discourse" and stimulates "public pressure for answers from those who know more." Milkovich v. Lorain Journal Co., supra, 497 U.S. at 35, 110 S.Ct. at 2714, 11 L.Ed.2d at 28 (Brennan, J., dissenting).

Here, prior to the Gallagher trial, another prominent doctor practicing in Canon City had been accused of sexual misconduct and had left the community. In addition, two local district attorneys, including one who had originally been assigned to the Gallagher case, had been accused of drug-related offenses, prompting the Canon City police chief to call publicly for a grand jury investigation into "the accusations, insinuations and rumors which have been leveled regarding public officials and law enforcement in the past year." Each of these events had received a great deal of publicity in the community.

In addition, the Gallagher trial, which involved a sexual assault by a doctor against his teenage patient, was highly controversial and had also received a great deal of publicity. Thus, it was well known that, following a trial to the court, in which three psychiatrists had testified as to his impaired mental condition, Gallagher was found not guilty by reason of mental impairment, and that, although Gallagher was ordered confined to a mental institution, he received no prison sentence.

In her letter, Campbell explicitly refers to the Gallagher trial, and there is ample evidence in the record to indicate that the letter was understood as referring to Keohane and the allegations surrounding other figures in the community. Such references to well-known events would put a reasonable reader on notice that Campbell based her allegations on facts which were generally known and available to the community. Thus, to a reasonable reader, Campbell's statements would be perceived as Campbell's personal appraisal of generally known facts and not as an assertion of any firsthand knowledge otherwise unavailable to the audience. See Burns v. McGraw-Hill Broadcasting Co., supra; see also Dunlap v. Wayne, supra, 105 Wash.2d at _____, 716 P.2d at 849 ("When a publisher makes a qualified or unqualified assertion of fact based upon true information supplied to the public or equally available to the public, he simply deduces a particular fact about the defamed person from known facts."). Because the factual premises for Campbell's conclusions generally were known, and because the letter contained no implied assertion of firsthand knowledge unknown to the audience, the audience remained free to judge the reasonableness, or lack thereof, of Campbell's conclusions, or to draw their own conclusions.

Moreover, the metaphoric choice of words and vituperative tenor of the letter, together with the placement of the letter, along with others by various authors, in the "letters to the editor" section of a local newspaper, tend to reinforce the conclusion that a reasonable person could not interpret the letter as an assertion of actual known fact. See Sall v. Barber, supra; see also Ollman v. Evans, 750 F.2d 970, 986 (D.C. Cir. 1984) ("The reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper."). As we have previously recognized, letters to the editor are a traditional forum for public debate and the expression of opinion. See Sall v. Barber, supra; Reddick v. Craig, 719 P.2d 340 (Colo. App. 1985).

2. The "White Collar Crime" Letter

Campbell's second letter, entitled White Collar Crime, Gold Rush of the 80's, appeared on page 14 of the November 8, 1988, Fremont Observer. It begins: "A trial to the court which means no jury, [sic] is used and only a judge renders a decision seems to be open to suspect [sic]." The letter then describes how a "judge is really in a position to clean up financially," if "as an example," the judge approaches an "old buddy, who just committed a heinous crime [and] stands to lose his license to practice law or medicine," and offers to find "a way out" of his dilemma in exchange for a "home in another state" and "some six figure money." "If this could be proven," the letter continues, "it is also called extortion. Using your position, elected or appointed, to line your own pockets is despicable at best and criminal at worst."

Again, we conclude that this letter contains verifiable factual statements or implications about Keohane. The letter states that a judge is in a position to "really clean up" in a trial to the court, and the factual similarities between the Gallagher trial and the "hypothetical" situation set forth in the letter implies that the judge in that case accepted a bribe. Clearly, these statements or implications are capable of being proved true or false. However, viewing the letter in context, we are not persuaded that a reasonable person could understand the letter as actually making an express or implied assertion of a known fact.

Specifically, although the White Collar Crime letter does not explicitly refer to any particular event, the factual similarities between Campbell's "hypothetical" and the well-known facts of the Gallagher trial would tend to alert a reasonable reader that the author was commenting on that trial. As with the Sick Pillars letter, several witnesses testified that the letter was understood as referring to the Gallagher trial. Thus, a reasonable person could not understand this letter as asserting actual facts known to the writer, but inaccessible to the reader; rather, the letter suggests an explanation for events which were well known in the community. As with the Sick Pillars letter, the audience remained free to judge the reasonableness of this explanation.

Moreover, the White Collar Crime letter is replete with conjectural language, including phrases such as "he can approach his old buddy with a deal" and "if this could be proven."

Although the phrasing of a statement in such "terms of apparency" is not dispositive, it would put the reasonable reader on notice that the inferences contained in the letter are speculative and not based upon the knowledge of the author. See Burns v. McGraw-Hill Broadcasting Co., supra. Thus, the phrasing of the letter also tends to negate the impression that the writer was actually maintaining a factual assertion. See Milkovich v. Lorain Journal Co., supra.

Hence, we conclude that the sum effect of the content, tone, and format of Campbell's letters are reasonably susceptible to interpretation only as an expression of her point of view, not as an assertion of actual known fact. Therefore, Campbell's letters were constitutionally protected and the trial court erred in submitting them to the jury on the issue of defamation.

III.

Next, defendants argue that, even if the statements were actionable, they were not defamatory, and therefore, the judgment against them must be reversed. Because we have already concluded that Campbell's letters were not actionable, we need not consider whether they were defamatory. See Living Will Center v. NBC Subsidiary (KCNC-TV), Inc., supra. Therefore, we limit our discussion to the issue of whether the trial court erred in ruling that Stewart's statements were slanderous per se. We perceive no error in this ruling.

A statement is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Burns v. McGraw-Hill Broadcasting Co., supra, at 1357; Restatement (Second) of Torts §559 (1977). Language need not prejudice the plaintiff in the eyes of a majority of the community; it is defamatory if plaintiff is prejudiced in the eyes of a substantial and respectable minority of the community. Burns v. McGraw-Hill Broadcasting Co., supra; Restatement (Second) of Torts §559, comment e (1977).

There are two types of defamatory statements: statements which are libelous or slanderous per se, and those that are libelous or slanderous per quod. To be libelous or slanderous per se a statement must be defamatory per se.

A statement may be considered defamatory per se if it is specifically directed at the person claiming injury and, on its face and without extrinsic proof, it is unmistakably recognized as injurious. Lininger v. Knight, 123 Colo. 213, 226 P.2d 809 (1951).

To determine whether a statement is defamatory per se, the court must examine the statement "alone, without the aid of inducements, colloquialisms, innuendos, and, explanatory circumstances." Inter-State Detective Bureau, Inc. v. Denver Post, Inc., 29 Colo. App. 313, 317, 484 P.2d 131, 133 (1971). A plaintiff proceeding under a theory of defamation per se need not plead or prove special damages. See Inter-State Detective Bureau, Inc. v. Denver Post, Inc., supra.

Historically, a statement constituted defamation per se if it imputed a criminal offense; a venereal or loathsome disease; improper conduct of a lawful trade, business, profession or office; or unchastity of a woman. See Cinguanta v. Burdett, 154 Colo. 37, 388 P.2d 779 (1963); Dorr v. C.B. Johnson, Inc., 660 P.2d 517 (Colo. App. 1983). Defamation per se has been narrowly construed, and recently this court has noted that per se classifications and presumed damages are not favored. See Hayes v. Smith, 832 P.2d 1022 (Colo. App. 1991).

In contrast, a statement is defamatory per quod if it requires innuendo or extrinsic evidence to establish its defamatory nature, and a plaintiff asserting a claim of slander per quod must plead and prove special damages. See Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962). A finding that a statement is defamatory per quod must be predicated on the context of the entire statement and the common meaning of the words utilized. See Burns v. McGraw-Hill Broadcasting Co., supra.

Whether a statement is to be considered slander per se or per quod is a question of law. Cinquanta v. Burdett, supra.

Here, Stewart's statements unmistakably relate to the commission of a criminal offense, i.e., accepting a bribe or use of drugs, or to improper conduct in office. In addition, the trial court found that "there is no possibility of confusing who the statement was about." Based upon these findings, the trial court instructed the jury as to slander per se. We perceive no error in this ruling.

It is immaterial whether Jurgens, the party to whom the statements were made, considered the statement defamatory. Rather, "[i]t is enough that the communication would tend to prejudice [plaintiff] in the eyes of a substantial and respectable minority" of the community. Restatement (Second) of Torts §559, comment e (1977); see also Burns v. McGraw-Hill Broadcasting Co., supra; cf. Cinquanta v. Burdett, supra (whether language is offensive to the recipient does not itself make the words slanderous per se). Moreover, if a statement imputes criminal activity or improper conduct in office, the words are presumed to be defamatory. See Inter-State Detective Bureau, Inc. v. Denver Post, Inc., supra.

Further, because it was uncontroverted that Jurgens understood that Stewart's remarks were directed at Keohane, extrinsic evidence was not required. "A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer." Restatement (Second) of Torts §564 (1977). Further, because the statements, as a matter of law, unmistakably refer to the criminal conduct of accepting a bribe, extrinsic evidence was not required to establish the defamatory nature of the statements. Therefore, the trial court did not err in instructing the jury as to a theory of slander per se.

IV.

Defendants also contend that Keohane, as a public figure plaintiff, should not be permitted to recover actual damages from Stewart on his claim for slander per se because only one person, Jurgens, heard the comment and he did not believe it to be true. We disagree.

Unlike a private figure plaintiff, a public figure asserting a claim for slander per se must establish actual damages. See Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978). Actual damages may be established by, among other things, evidence of harm to reputation, personal humiliation, mental anguish and suffering, or physical suffering. See Bolduc v. Bailey, 586 F. Supp. 896 (D. Colo. 1984); CJI-Civ. 3d 22:12 (1989).

That a defamatory statement is made to one person will not preclude recovery of actual damages; the number of people hearing the defamatory statement is relevant to the amount, not the fact, of damages. See Bolduc v. Bailey, supra (defamatory statement initially made to one member of defendant's religious organization, then transmitted to others); CJI-Civ. 3d 22:23 (1989) (concerning repetition of defamatory statements).

Here, Keohane testified that following the publication of the Daily Record article, in which Stewart was alleged to have stated, "There's the best judge money can buy," Keohane contacted Jurgens, whereupon he learned that Stewart had asked Jurgens whether Keohane had been "paid off" with cocaine or cash. Keohane further testified that he was "devastated" by the Daily Record article and that learning of the additional allegations that he had accepted a bribe made him feel worse.

Although damages for humiliation and mental anguish are difficult to evaluate, see Rowe v. Metz, supra, Keohane's testimony is sufficient to permit the jury to conclude that he suffered actual damage. See Bolduc v. Bailey, supra. Moreover, in light of the facts in the record, we conclude that the jury's award of damages is not "grossly and manifestly excessive," and therefore, we will not disturb it on review. See Zertuche v. Montgomery Ward & Co., 706 P.2d 424, 428 (Colo. App. 1985).

V.

Finally, defendants contend that the trial court's order changing venue was procedurally flawed because no formal motion or affidavit had been filed at the time the court granted the motion. These procedural flaws, they contend, obligated the El Paso County district court to return venue to the Fremont County district court, and therefore, the judgment of the trial court must be reversed. Again, we disagree.

Although venue may be proper in the district where an action is brought, a court may, on motion or its own initiative, order a change of venue if the convenience of the parties or witnesses or the ends of justice so require. C.R.C.P. 98(e), (f), (g). The existence of prejudice justifying a change of venue is a question of fact within the discretion of the trial court, Nowels v. People, 166 Colo. 140, 442 P.2d 410 (1968), and the moving party bears the burden of establishing such prejudice by affidavit or evidence. Colorado Department of Highways v. District Court, 635 P.2d 889 (Colo. 1981). The grant of a motion for change of venue in such a case is discretionary and will not be reversed on review absent a clear showing of an abuse of that discretion. Weston v. Mincomp Corp., 698 P.2d 274 (Colo. App. 1985).

Here, at the hearing on the motion to change venue, a majority of the defendants, through their counsel, stipulated to the difficulty of obtaining a fair trial in Fremont County. Specifically, they stipulated that Keohane's prior employment as a judge in Fremont County and the wide publicity surrounding the Gallagher trial and the indictment of a local district attorney for the use and distribution of cocaine would make it difficult to empanel an impartial jury. In addition, they stipulated that publicity surrounding the Fremont Observer and other articles involving corruption published therein would also make it difficult to empanel an impartial jury.

Although all parties did not stipulate to the change of venue within the meaning of C.R.C.P. 98(i), the facts stipulated to by a majority of the defendants provided sufficient good cause for the change of venue. Therefore, under these circumstances, although no supporting affidavits were filed and no evidence on the issue of prejudice was received, the trial court did not abuse its discretion in relying on the facts stipulated to by a majority of the defendants. Cf. Ranger Insurance Co. v. District Court, 647 P.2d 1229 (Colo. 1982).

Moreover, defendants do not allege on appeal that they suffered any prejudice to their substantial rights as a result of the change of venue. Thus, procedural flaws in the trial court's order changing venue, if any, would constitute harmless error. Cf. Western Wood Products v. Tittle, 79 Colo. 473, 246 P. 791 (1926).

Because our resolution of these issues completely disposes of this appeal, we need not address the additional arguments raised by the parties.

The judgment of the trial court is reversed insofar as it awards damages for libel against Campbell and Wilkerson. Insofar as it awards damages for slander against Stewart, the judgment is affirmed.

JUDGE METZGER and JUDGE BRIGGS concur.

DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO

Case No. 91-CV-2042, Division 2

ORDER FOR ENTRY OF JUDGMENT

PAUL J. KEOHANE,

Plaintiff,

v.

FREMONT PUBLISHING, INC., a Colorado corporation,
and GROVER K. WILKERSON, STEPHEN STEWART, JOSHUA
LYON, HUGH WILLIAMS, ETTA P. SNIDER, MELBA STEELE,
EDWARD HERZOG, JUDY KNIGHT, and TERRI CAMPBELL,
individually,

Defendants.

This case was tried to a jury beginning July 8, 1991, and concluded with a verdict returned on July 19, 1991, in favor of the Plaintiff and against the respective defendants indicated as follows:

Against the Defendant, Grover K. Wilkerson, $25,000.00 damages and, in addition $5,000.00 in punitive damages for a total amount of $30,000.00.

Against the Defendant Terri Campbell, also known as Ila T. Campbell, $25,000.00 damages and, in addition $1,000.00 in punitive damages, for a total of $26,000.00.

Against the Defendant, Stephen Stewart, $15,000.00 damages, and in addition, ~~$5,000.00~~2,500.00 in punitive damages for a total of ~~$20,000.00~~17,500.00.

The Court is required by statute and common law to make certain adjustments to the jury verdict, to give effect to the statute which provides for pre-judgment interest.

The cause of action as to Defendants, Grover K. Wilkerson, and Terri Campbell, also known as Ila T. Campbell accrued on November 8, 1988.

The cause of action as to the defendant, Stephen Stewart, accrued on November 3, 1988. The within suit was filed on October 10, 1989.

Pursuant to C.R.S. 13-21-101 prejudgment interest on a personal injury judgment is calculated at a rate of 9% simple interest from the date the cause of action accrues and at a rate of 9% compounded annually from the date the suit is filed until the judgment is satisfied, as to the general damages.

As to punitive damages interest accrues from the date of the verdict, to-wit July 19, 1991.

IT IS HEREBY ORDERED: Judgments be entered in favor of Paul J. Keohane and against Defendant, Grover Wilkerson, in the amount of $36,590.60 as of July 19, 1991; and against the Defendant, Stephen Stewart, in the amount of ~~$23,957.02~~21,475.02 as of July 19, 1991; and against the Defendant, Terri Campbell also known as Ila T. Campbell, in the amount of $32,590.60 as of July 19, 1991.

Interest continues at $9.02 per day against Defendant, Grover Wilkerson; at a rate of ~~$5.91~~5.29 per day against the Defendant, Stephen Stewart, and at a rate of $8.04 per day against the Defendant, Terri Campbell, also known as Ila T. Campbell until the judgment is satisfied (Or until this daily rate is changed by appeal or compounding on October 11th of each year).

BY THE COURT:

____

District Judge

Calculations of interest are pursuant to C.R.S. 13-21-101. The cause of action ocured on 11/3/88 as to defendant, Steve Stewart. The cause of action occured on 11/8/88 as to defendants, Grover Wilkerson, and Terri Campbell. The within suit was filed on 10/10/89. Interest on the punitive damages accrues from the date of the verdict, to-wit 7/19/91.

NAME	DATE	INT RATE	PRINCIPAL	PER DIEM	NO. OF DAYS	TOTAL INTEREST	BALANCE
STEWART	11/3/88 thru 10/11/89	9%	$15,000.00	$3.70	342	$1,265.40	$16,265.40
STEWART	10/11/89 to 10/11/90	9%	$16,265.40	$4.01	365	$1,463.65	$17,729.05
STEWART	10/11/90 TO 7/19/90	9%	$17,729.05	$4.37	281	$1,227.97	$18,957.02
STEWART	7/19/91	9%	~~$23,957.02~~**	~~$5,915.29~~			
			21,475.02				

** Amount includes ~~$5,000.00~~ 2,500.00 punitive damages awarded by the jury.

WILKERSON	11/8/88 thru 10/11/89	9%	$25,000.00	$6.16	342	$2,106.72	$27,106.72
WILKERSON	10/11/89 to 10/11/90	9%	$27,106.72	$6.68	365	$2,438.20	$29,544.92
WILKERSON	10/11/90 TO 7/19/91	9%	$29,544.92	$7.28	281	$2,045.68	$31,590.60

WILKERSON	7/19/91	9%	$36,590.60**	$9.02			

** Amount includes $5,000.00 punitive damages awarded by the jury.

CAMPBELL	11/8/88 thru 10/11/89	9%	$25,000.00	$6.16	342	$2,106.72	$27,106.72
CAMPBELL	10/11/89 to 10/11/90	9%	$27,106.72	$6.68	365	$2,438.20	$29,544.92
CAMPBELL	10/11/90 to 7/19//91	9%	$29,544.92	$7.28	281	$2,045.68	$31.590.60
CAMPBELL	7/19/91	9%	$32,590.60**	$8.04			

** Amount includes $1,000.00 punitive damages awarded by the jury.

SUPREME COURT, STATE OF COLORADO

Case No. 93SC382

CROSS-PETITIONER STEPHEN STEWART'S PETITION FOR REHEARING

PAUL J. KEOHANE, Petitioner/Cross-Respondent,

v.

STEPHEN STEWART, Cross-Petitioner,

v.

GROVER K. WILKERSON and TERRI CAMPBELL, Respondents.

Certiorari from the Colorado Court of Appeals,
91 CA 1840 Trial Judge Richard V. Hall

Date of Decision: July 11, 1994 EN BANC

JUSTICE ERICKSON delivered the Opinion of the Court
CHIEF JUSTICE ROVIRA concurs in part and dissents in part, and JUSTICE LOHR and JUSTICE MULLARKEY join in the concurrence and dissent.

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INTRODUCTION

The Court's 4-3 decision undermines the right of Colorado citizens to criticize governmental officials, thereby heightening the chilling effect warned of in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). As noted by the Denver Post,

> Usually, courts rein in an overzealous legislature to protect individual freedoms. In this instance, the State Supreme Court gravely injured citizens' ability to say what they want about those who govern them or influence their lives.

"Damages Are Not Deserved For Simple Hurt Feelings", The Denver Post, July 31, 1994 at 2E (attached as Exhibit A). Now, Colorado citizens must refrain from making spontaneous comments about controversial acts by public officials, lest they be held to pay damages when those remarks cause the official to suffer nothing more than hurt feelings. As noted by the Post, "[this] alarmingly weak standard may let public officials use the courts to harass citizens who criticize them." Id.

Recently, in the United States Court of Appeals for the District of Columbia, a panel realized it similarly had erred and, upon a petition for rehearing, reversed its prior decision in a defamation action. In introducing the new opinion, Judge Edwards took comfort in the words of Justice Frankfurter:

> Wisdom too often never comes, so one ought not to reject it merely because it comes late.

Moldea v. New York Times Co., 22 F.3d 310, 311 (D.C. Cir. 1994), quoting Henslee v. Union Planters Nat'l. Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

Here, Justice Rovira's dissenting opinion has far the better of the arguments. Those arguments presumably were considered and rejected by the Majority; for the most part, they will not be repeated. However, in several key respects not mentioned by the dissent, the Majority fundamentally misapprehends the law of defamation such that rehearing should be granted. Specifically, the Majority misinterprets the

Milkovich test and applies it inconsistently, resulting in confusing precedent rather than the clear guidance needed in this area of the law. Additionally, the Majority's analysis is tainted by the Court's failure to properly consider the entire record de novo. Finally, the Majority's decision allowing public officials to recover for emotional distress, absent any proof of reputational harm, is inconsistent with Colorado tort law and the United States Constitution.

ARGUMENT

III. THE MAJORITY MISINTERPRETS AND MISAPPLIES MILKOVICH.

The Majority correctly holds that under Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), and Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983), a statement is constitutionally protected if it "does not contain a provably false factual connotation" or if it "cannot reasonably [be] interpreted as stating actual facts about an individual." Opinion at 9-10. A court, however, cannot apply these factors in the abstract, but must consider both the particular record before it and basic principles of defamation law. In this respect, the Majority fundamentally misapprehended the law.

A. The Majority's Conclusion That Stewart's Questions Are Provable As False Misapprehends Basic Defamation Law.

Under the first prong of the Milkovich test, a statement's "implication" must be determined to analyze whether it is provable as false. Milkovich, 497 U.S. at 20. In determining the implication of Stewart's questions, the Majority misstates and misconstrues the common law of defamation. A linchpin of the Opinion is its reference, in interpreting the statements, to the "substantial and respectable minority" requirement of § 559 of the Restatement (Second) of Torts (1977). Opinion at 10 n.9 & 20 n.14 (citing Burns). Only through this reference is the Majority able to ignore the record concerning Jurgens' lack of understanding of Stewart's statements, while purporting to satisfy its duty of de novo review.

The Restatement makes clear that the "substantial and respectable minority" requirement is the second step to be applied in a two-step analysis. The first step is to determine the meaning of the allegedly defamatory communication, which is "that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Restatement § 563. See also Churchey v. Adolph Coors Co., 759 P.2d 1336, 1356 (Colo. 1988) (Erickson, J., dissenting); White v. Fraternal Order of Police, 909 F.2d 512, 519 (D.C. Cir. 1990); Froess v. Bulman, 610 F. Supp. 332, 340 (D.R.I. 1984), aff'd, 767 F.2d 905 (1st Cir. 1985).

After the meaning of the communication is determined, the "substantial and respectable minority" test is applied to decide whether that meaning is defamatory. See Restatement § 563 cmt. a. Even if a statement would tend to prejudice the plaintiff in the eyes of a respectable minority of the community, there is no defamation if the recipient did not understand it in its defamatory sense. Id. cmt. b. See also Prosser and Keeton on Torts 798 (5th ed. 1984) ("[S]ince it is the defamatory meaning which must be communicated, it must be shown that the utterance was understood in that sense"); Pritsker v. Brudnoy, 452 N.E.2d 227, 231 n.9 (Mass. 1983). Thus, the recipient's actual understanding is dispositive. Although this Court has specifically adopted § 563 of the Restatement, Burns, 659 P.2d at 1357, and although the Majority appears to recognize the relevance of common law principles to the Milkovich inquiry, it misapprehended this key requirement.[10]

As a result of this oversight, the Majority's application of Burns and Milkovich to Stewart's speech is erroneous. The Court acknowledges that Jurgens, the only person who heard Stewart, testified he did not understand Stewart's questions. Opinion at 25. Nevertheless, the Majority gives no weight to Jurgens' testimony in concluding that the implication of those questions was "clear: Stewart was asserting that Judge Keohane took a bribe." Opinion at 19. It is impossible to square this finding with proper de novo review. Because the Majority did not correctly determine the "implication" of Stewart's questions by examining Jurgens' interpretation, it erroneously applied the first prong of the Milkovich test.

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[10] The Decision may have overlooked this step because the primary cases it relies on (including Burns and Milkovich) concern widely disseminated communications, where it is impossible to measure the statement's impact on every recipient. In those cases, it is appropriate to assess the statement's meaning using a contextual, "common usage" approach. The case at hand, however, concerns an oral statement made to only one other person, who testified as to how he interpreted the statement and the effect it had on his estimation of the plaintiff. Under the common law, that person's interpretation is dispositive. See Restatement § 563 cmt. c.

B. The Majority Applied The Burns Factors Inconsistently.

The Majority used the Burns factors--phrasing, context, and circumstances--to analyze the actionability of both Campbell's letters and Stewart's questions. In doing so, the Majority applies the same factors inconsistently.

For example, in analyzing Campbell's letters, the Majority points to their speculative and conjectural language as evidence that a reasonable listener would not interpret them as stating actual facts. Then, when analyzing Stewart's statements, the Majority completely disregards the fact that the phrasing of Stewart's statements is in the form of a question, which commonly indicates conjecture or speculation. The Majority also ignores the fact that the phrasing of the questions renders them ambiguous. Instead, the Majority inexplicably uses the phrasing of Stewart's questions to support its conclusion that they can only be interpreted in one way: as an assertion that Keohane took a bribe for the Gallagher verdict.

In fact, the Majority uses an example--"Is John Jones a liar or a cheat?" that highlights the problem. Opinion at 20 n.13. The Majority contends that this question has only one meaning: "John Jones is dishonest because he is either a liar or cheat." Grammatically, however, the example could have the totally different meaning of simply inquiring: "Is John Jones a liar; is John Jones a cheat?" Also, the statement/question could be hyperbole based on the questioner's adverse reaction to a position taken by John Jones. This Court cannot simply ignore these possibilities, especially in the face of a record that does not support the conclusion that the first meaning was the one understood by the only listener.

The Majority's inconsistent approach is even more dramatic in its consideration of context and surrounding circumstances. The Majority recognizes that both Campbell's letters and Stewart's questions occurred in the context of well-publicized events, and that recipients of both were familiar with the Canon City scandals and the anger of the community at the Gallagher verdict. Yet the Majority uses this common context to achieve radically different outcomes. In evaluating Campbell's letters, the Majority cites this background as evidence that the readers of the letters would understand them to be mere speculation about what happened in the Gallagher trial. Then, in evaluating Stewart's questions, the Majority uses the same context to support its contention that Jurgens could be expected to take the alleged implication of bribery at face value.[11]

Similarly, because Campbell's letters appeared in the letters to the editor section of the paper, the Majority states that readers were predisposed not to take what was said at face value. Opinion at 15-16. Yet, despite Jurgens' direct testimony to the contrary, the Majority decides that Jurgens was (or should have been) predisposed to take Stewart's remarks at face value.[12] This inconsistent application of the Burns factors results in precedent that offers virtually no guidance to lower courts attempting to discern the actionability of a statement.

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[11] The Majority also relies on the fact that Stewart was a councilman to supports its conclusion that Stewart's questions implied that he was basing his opinion on "inside information." See Opinion at 21. As recognized by the dissent, however, nothing in Stewart's questions implied he was aware of such information, and his position as a councilman did not put him in a position to obtain it. Dissent at 8.

[12] The Court should have evaluated the questions based on how a reasonable listener in the actual recipient's position would have interpreted the statement. Since Jurgens and Stewart both sat through the trial, were exposed to the same publicity, and were personally acquainted (Jurgens never knew "whether [a Stewart remark] was said for effect, or whether it was said because it was something [Stewart] honestly believed"), a reasonable listener in Jurgens' position would have believed that Stewart's comments were an intemperate reaction predicated on his dissatisfaction with the trial's outcome, and not on undisclosed defamatory facts. Restatement § 563 cmt. c & e.

IV. THE MAJORITY ERRONEOUSLY DEFERRED TO THE TRIAL COURT'S INTERPRETATION OF THE QUESTIONS.

The First Amendment demands that when free speech interests are at issue, a finding of liability must be supported by an independent review of the entire record. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984); Milkovich, 497 U.S. at 17. The Majority failed to fulfill this duty. Instead, it defers to the trial court's interpretation of the implication of Stewart's questions, reasoning that "the reasonable understanding of [Stewart's] remarks turns in part on ... inflection." Opinion at 23 n.15. Yet the trial court never made any finding regarding Stewart's inflection, nor did it charge the jury to evaluate this fact.[13] More importantly, the Court fails to explain how the trial court's evaluation of inflection can negate Jurgens' understanding.

V. THE COURT'S HOLDING ON DAMAGES FAILED TO CONSIDER APPLICABLE FEDERAL AND STATE PRECEDENT.

A. The Opinion Misapprehends the Significance of First Amendment Law In Its Examination of the Damages Issue.

The Majority's view of the damages issue is apparently attributable to its belief that this issue "does not affect significant constitutional interests." Opinion at 24. To the contrary, this case necessarily raises the constitutional question of whether a public official may obtain emotional distress damages for speech concerning his public conduct without proving harm to his reputation. This Court's reliance on Time, Inc. v. Firestone, 424 U.S. 448 (1976), overlooks that the plaintiff there was determined to be a private figure. Since Firestone, the Court has expressed a profound distrust of emotional damage awards to public figures for speech criticizing their public behavior. In Hustler Magazine v. Falwell, 485 U.S. 45 (1988), the Court squarely rejected the argument that a "State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech . . . [that] could not reasonably have been interpreted by the listener as stating actual facts about the public figure involved." Id. at 50. A similar rationale should apply to speech that was not interpreted by the only listener as stating actual facts about the public figure involved. The Supreme Court has allowed liability for speech about a public figure only when that speech was made with actual malice and caused demonstrable damage to a public figure's reputation. Id. at 52. The Majority's decision on this issue clearly violates the spirit--and likely the letter--of the Falwell decision.

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[13] Furthermore, Stewart's pretrial motion for summary judgment, which argued the questions were constitutionally protected speech (attached as Exhibit B), was denied by the trial judge, thus revealing that inflection was not evaluated.

B. The Court Failed To Examine The Damages Issue In Light Of The Overall Scheme Of Colorado Tort Law.

This Court has consistently refused to recognize the viability of a cause of action for damages merely because a plaintiff suffered emotional distress. See Towns v. Anderson, 579 P.2d 1163 (Colo. 1978); Rugg v. McCarty, 476 P.2d 753, 756 (Colo. 1970). In fact, on the same day it handed down the decision in this case, the Court stated that it "ha[s] never recognized a cause of action for emotional distress in negligence without proof that the plaintiff sustained physical injury or was in the 'zone of danger.'" Culpepper v. Pearl Street Bldg., Inc., 16 B.T.R. 1256, 1260 n.3 (Colo. July 11, 1994). The Opinion here belies that contention. Allowing a public official to recover compensation in a defamation action, when his sole damages are emotional distress, "converts the law of defamation into a weak-kneed surrogate for claims of intentional or negligent infliction of emotional distress." Dissent at 17 n.9.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

HOLLAND & HART

/s/

A. Bruce Jones
Stephanie D. Welsh
Alan N. Stern

DISTRICT COURT, COUNTY OF EL PASO, STATE OF COLORADO

Case No. 91 CV 2042, Division 2

MOTION FOR SUMMARY JUDGMENT

PAUL KEOHANE, Plaintiff,

v.

FREMONT PUBLISHING, INC., et al., Defendants.

COMES NOW Defendant Stephen M. Stewart, pro se, and moves the Court for an Order dismissing all claims against him and as grounds therefore would show the Court as follows:

1. At all times pertinent the Plaintiff was Chief District Court Judge for the 11th Judicial District of the State of Colorado.

2. As a District Court Judge the Plaintiff was a public official.

3. Plaintiff claims that Defendant Stewart was Vice President of Fremont Publishing, Inc. at all pertinent times. See Second Amended Complaint paragraph 4. Defendant Stewart denies that he was Vice President. See Affidavit of Stephen M. Stewart which is attached as Exhibit "A".

4. Plaintiff claims in paragraph 18 of his complaint that Defendant Stewart made certain defamatory statements which were asserted as fact to a reporter and the managing editor of the Canon City Daily Record. Defendant Stewart denies making such a statement. See Affidavit of Stephen M. Stewart which is attached as Exhibit "A". Dwight Jurgens, who was a reporter for the Canon City Daily Record at the pertinent time states that Defendant Stewart did pose a question to him regarding the Plaintiff. See Affidavit of Dwight C. Jurgens which is attached as Exhibit "B".

5. Plaintiff has stated under oath in deposition that the reporter to whom the alleged oral statement was made is Dwight Jurgens. See page 72 line 9 through page 73 line 23 of Plaintiff's Deposition which is attached as Exhibit "C".

6. Plaintiff persists in asserting that the alleged statements were made to the managing editor, Richard Joyce, of the Canon city Daily Records as well. Joyce, to the contrary, states under oath that immediately after the complaint was filed that Joyce called the Plaintiff to advise him that he had not heard the alleged statement. See page 12 line 2 through 21 line 17 of the deposition of Richard Joyce attached as Exhibit "D".

7. Defendant Stewart did not write, review, edit, publish, distribute, assist, control or urge others to write any editorials, letters to the editor, news articles, cartoons or statements that Plaintiff alleges to be defamatory. See Affidavit of Stephen M. Stewart which is attached as Exhibit "A".

8. Plaintiff claims in paragraph 21 of the Second Amended Complaint that "The average observer of the oral statement, and reader of the Fremont Observer, drew from the published oral statements, ..., that the Plaintiff was corrupt and was engaged in criminal conduct involving the possession, use, or distribution of a controlled substance in connection with his employment as a public official." The "oral statement" or "question", assuming it was made by the Defendant Stewart to one other person, Dwight Jurgens, could not have been known to a reader of the Fremont Observer since it was not published by the Fremont Observer. The Plaintiff is responsible for the only further publication of the "oral statement" made by Dwight C. Jurgens to the Plaintiff. See Affidavit of Stephen M. Stewart which is attached as Exhibit "A" and Affidavit of Dwight C. Jurgens which is attached as Exhibit "B".

9. It is a question of law whether an oral statement is slanderous per se. Walker v. Associated Press, 417 P.2d 486 (1966); Lininger v. Knight, 226 P.2d 809 (1951); Interstate Detective Bureau, Inc. v. Denver Post, Inc., 484 P.2d 131 (1971).

10. In his affidavit (Exhibit "B") Dwight Jurgens swears the statement made to him is as follows:

"What do you think, was he paid in drugs or money?"

I replied, "What? You can't be serious."

Stewart said, "No, really Dwight, do you think Keohane was paid off in cash or cocaine?"

11. Later in his affidavit, commenting on the circumstances, Jurgens says, "I was never very successful in determining when Councilman Stewart was saying something for an effect, or rather because he sincerely believed it." Exhibit "B".

12. the meaning of the statement must be gathered from the words and the circumstances under which it was uttered. Knapp v. Post Printing & Publishing Co., 144 P.2d 981 (1943).

13. The words must be construed according to their natural and ordinary meaning. Knapp supra quoting Peake v. Oldham, Cowp. 275; Bigelow's Cas. 122; Bigelow's Lead. Cas. 73.

14. Contrary to Plaintiff's assertions in paragraph 18 of his complaint, Jurgens' affidavit (Exhibit "B") clearly sets forth that Stewart's statement was a question. The alleged statement on its face is nothing more than an inquiry regarding whether Jurgens thought Keohane was paid off. It does not contain nor imply any assertion of underlying facts. Lane v. Arkansas Valley Publishing Company, 675 P.2d 747 (1983).

15. The Plaintiff, as District Judge, sitting in a highly visible and notorious criminal proceeding (Exhibit "B") was a public official involved in a public issue. Therefore, the context in which the statement is made falls completely within the public official/public issue language of New York Times Co. v. Sullivan, 376 U.S. 254, 84 St.Ct. 710, 11L.Ed.2d 686 (1964).

16. Public issues require a continuing commitment to uninhibited, robust and wide-open debate. New York Times Co., supra. Stewart's inquiry of Jurgens sits squarely within that principle and implied nothing more than what was asked and asked for nothing more than Jurgens' opinion.

17. Stewart's inquiry sought Jurgens' opinion. If there is no such thing as a false idea, Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), can there possibly be such a thing as a false solicitation of another's opinion? The case law concerning protected speech in the public arena holds clearly and firmly and consistently that there is not. See New York Times Co. and Gertz supra. Burns v. McGraw-Hill Broadcasting Co., Inc., 659 P.2d 1351 (1983).

18. The alleged "oral statement" or "question" made by Defendant Stewart is clearly, notwithstanding Plaintiff's attempted mischaracterization, an inquiry, and contains not once but twice the important qualifying words "what do you think?" (Exhibit "B").

19. A statement prefaced with "in my opinion" or language of similar import is a clear signal of protected speech. Lane, supra citing with approval Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980).

20. "What do you think?" definitely places this statement well within protected speech. Rather than implying fact, these qualifying words clearly signal to the hearer that an opinion is sought and facts are not asserted or implied.

21. Finally, even if the "question" was posed to Jurgens, it is clear from express statements in Jurgens' affidavit that the query that Stewart made to him only (" ...., I was the only person within earshot.") in no way altered or modified Jurgens' very high opinion of Paul Keohane. As he indicated in his statement to Keohane even after he had heard the question posed by Stewart ".... I was talking with Judge Keohane and told him I thought his decision in the Gallagher case, which came less than five days before an election in which he was up for retention, was one of the most courageous I had ever witnessed." There was no damage to Keohane's reputation in the mind of the sole hearer of the question since he affirms that he has the highest regard for Keohane.

22. In paragraph 65 of the Eighth Claim for Relief the Plaintiff alleges extreme and outrageous conduct in the publication of the "oral statement", cartoon and editorials. Public figures may not maintain a claim for outrageous conduct when conduct complained of is expressive

behavior directed at his "public persona." Plaintiff admits in his pleadings that the "oral statement", cartoon and editorials were directed at him in his capacity as a public official. See Brooks v. Paige, 773 P.2d 1098 (Colo. App. 1988).

WHEREFORE, Defendant Stephen Stewart prays this Court grant him the relief he requests and order summary judgment dismissing all claims against him contained in the Plaintiff's Second Amended Complaint and award such other and further relief as the Court deems appropriate.

Dated June 10, 1991.

/s/
Stephen M. Stewart
1212 Main Street
Canon City, CO 81215-0429
(719) 275-0674

The Denver Post, July 31, 1994 - "Damages are not deserved for simple hurt feelings"

Watch out, Coloradans -- if you bellyache about a public official you could be sued just for hurting his or her feelings, because of a recent state Supreme Court case.

In the 1980s, several local scandals enraged citizens of Fremont County. Police arrested a district attorney for possession of illegal drugs and an assistant district attorney resigned while being investigated for similar misdeeds. Two Cañon City doctors reportedly engaged in improper medical procedures.

Against this backdrop, Dr. Michael Gallagher was charged with sexually assaulting a 16-year-old patient at St. Thomas More Hospital in 1987. The judge who heard the case was Paul J. Keohane -- and Keohane previously had represented the hospital for 15 years.

Twice, Keohane could have handed the controversial matter over to another judge but instead he kept the case for himself. He knowingly put himself in a position where, if he ruled in favor of the accused doctor, he would be subjected to public criticism.

Keohane did decide in the doctor's favor on a couple of key issues. He granted Gallagher's request that only he, not a jury, would hear the case. At the end of the trial, Keohane concluded Gallagher wasn't mentally capable of taking responsibility for his crime and so the judge sent the doctor to psychiatric care. Gallagher never served prison time for charges that he masturbated and ejaculated into his young patient's mouth during surgery.

Many people in Cañon City were outraged, including a city council member named Steve Stewart. During the trial, Stewart had called Keohane "the best judge money can buy." A reporter for the local newspaper, the Cañon City Daily Record, included the remark in an article.

Later, after Keohane's controversial verdict, Stewart asked the reporter whether he thought Keohane had been "paid off in drugs or money?" Apparently puzzled by the question, the reporter said "what?"

Stewart responded, "Do you think he was paid off in cash or cocaine?" The reporter then said, "Steve, you are a real piece of work." Testimony showed the reporter never gave serious consideration to Stewart's remark, and didn't publish it.

A few days later, Keohane faced voters in a regularly scheduled election -- and voters tossed him out of office.

Keohane then sued more than a dozen defendants, including the newspaper and Councilman Stewart. The state Supreme Court said the paper and most of the defendants weren't liable.

But Stewart was found liable. The liability didn't stem from comments that got printed in the paper; it came from the hyperbolic "drugs or money" question. Thus, the court said a citizen would have to pay big bucks for commenting on a public official's controversial decision.

Worse, Keohane never had to prove he suffered actual financial damage. He just had to claim that Stewart's comments made him feel bad. The state Supreme Court has said public figures can sue citizens whose criticisms upset them emotionally. The alarmingly weak standard may let public officials use the courts to harass citizens who criticize them.

The vote in this case was four to three. Dissenting Justice Luis Rovira wrote for himself and Justices George Lohr and Mary Mullarkey: "Permitting public officials to recover damages solely for emotional distress in a defamation action will result in a chilling of speech and discouragement of public debate. Knowing that they can be sued for nothing more than hurting the feelings of public officials, citizens will be more likely to remain silent on issues of public interest. Such an outcome clearly is contrary to the value placed on vigorous political debate and the principles which the First Amendment is intended to further . . . Without having to prove harm to reputation, a plaintiff could prevail and be awarded significant damages based on nothing more than self-serving testimony of hurt feelings.

Usually, courts rein in an overzealous legislature to protect individual freedoms. In this instance, the state Supreme Court gravely injured citizens' ability to say what they want about those who govern them or influence their lives.

Stewart certainly ought to appeal this decision to the U.S. Supreme court, and he ought to be backed in this case by the Colorado attorney general.

However, if the nation's high court refuses the case, then the Judiciary Committees in the state House and Senate should carefully rewrite Colorado law so public figures have to show actual damages beyond hurt feelings before they can sue citizens for criticizing them.